Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1051

CITY OF ROHNERT PARK, a municipal corporation,

Petitioner,

v.

MOON LANDRIEU, as Secretary of the United States Department of Housing and Urban Development, CITY OF SANTA ROSA, a municipal corporation, URBAN RENEWAL AGENCY of the City of Santa Rosa, a public body, corporate and politic, and ERNEST W. HAHN, INC., a California corporation,

Respondents.

Appendices A Through K To Brief In Opposition To Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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Of Counsel

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To
Brief In Opposition To Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

Appendices

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United States District Court
Northern District of California
Civil Action No. 74-2429 RHS

City of Rohnert Park, a municipal corporation,
Plaintiff,

v.

James T. Lynn, as Secretary of the United States Department of Housing and Urban Development, City of Santa Rosa, a municipal corporation, Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic, and Ernest W. Hahn, Inc., a California corporation,
Defendants.

AFFIDAVIT OF JAMES K. BURNS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS

STATE OF CALIFORNIA
COUNTY OF SONOMA

JAMES K. BURNS, being duly sworn, deposes and says:

I am the duly appointed Executive Director of the Santa Rosa Housing and Redevelopment Agency, which prior to 1975 was known as the Urban Renewal Agency of the City of Santa Rosa (hereafter "the Agency"). I have served continuously since October 1, 1971, as a chief administrator of urban renewal programs for the City of Santa Rosa. In this capacity I

have attended all meetings and hearings of the Agency, maintained the records, documents and minutes of the Agency, and rendered assistance and technical advice to the Agency members in connection with their exercise of the powers and discharge of the responsibilities conferred upon them by the Community Redevelopment Law and the City Council of the City of Santa Rosa.

1. THE SANTA ROSA CENTRAL BUSINESS DISTRICT URBAN RENEWAL PROJECT.

1.01 The Agency is engaged in carrying out an urban renewal (referred to as "redevelopment" in California Law) project in the central business district of Santa Rosa. The Agency records reflect the facts relating to the project set forth below in paragraphs 1.02-1.06.

1.02 The redevelopment plan for the project was first adopted by the Santa Rosa City Council on December 5, 1961, by Ordinance No. 1036. The approximate 40-acre area included in the project by the original redevelopment plan is known as Phase I.

1.03 In late 1969 and early 1970, after earthquakes on October 1, 1969, caused substantial damage to the downtown area, the Agency conducted studies directed toward expanding the boundaries of the project area. On March 10, 1970, the City Council by Ordinance No. 1436 adopted an amended redevelopment plan adding approximately 31 acres to the project. The area added to the project in 1970 is commonly referred to as Phase II.

1.04 Phase I and Phase II of the urban renewal project have received federal assistance under a loan and grant contract, which was originally executed by the Agency and the Housing and Home Finance Agency, a predecessor of the Department of Housing and Urban Development, on June 2, 1962. By the terms of the loan and grant contract the United States agreed to defray three-fourths of the net project costs and the Agency agreed to defray one-fourth of such costs. The loan and grant contract has been amended several times by agreement between the parties thereto. On or about September 14, 1970, the sixth amendatory loan and grant contract increased the total federal grant from $3,263,332.00 to $8,318,497.00 to reflect approval of federal assistance for the Phase II area.

1.05 On October 29, 1974, the Santa Rosa City Council held hearings hereafter described and adopted Ordinance 1741 amending the redevelopment plan to add the 12 acres known as Phase III to the project. Phase III does not receive assistance under the loan and grant contract.

1.06 Phase I and Phase II and Phase III are part of a single redevelopment project under state law. Phase I and Phase II have the designation of "The Santa Rosa Center Urban Renewal Project (Calif. R-45)" for federal assistance purposes.

1.07 The federal assistance under the loan and grant contract will total approximately $15.7 million. Of this amount approximately $14.1 million has already been spent by the Agency. The remaining $1.6 million has been obtained by the Agency through sale of Agency notes guaranteed by the federal government. The funds have been deposited by the Agency in an interest

bearing account and are being spent in accordance with an approved budget. The principal budgeted uses of the funds are for administration, interest on loans, site clearance, relocation and other costs which are not related in any way to the nature of the reuse of the presently undeveloped portion of the project area, regardless of whether that reuse is for a shopping center or some other form of development. Less than one-third of the remaining federal loan and grant funds are budgeted for construction of physical improvements of any kind, and the proposed physical improvements, such as street widening, are necessary and appropriate regardless of the particular land reuse.

1.08 I have requested additional loan and grant assistance for the project on behalf of the Agency, but I have been informed by Mr. Julian Fitzburgh and Michael Daughtery of H.U.D. that no such additional federal funding will be furnished under any circumstances.

2. NEGOTIATIONS WITH ERNEST W. HAHN, INC.

2.01 In late 1971 and early 1972 I personally called several real estate brokers and firms and retailing firms to determine the interest, if any, in developing a shopping center in the then undeveloped portion of the redevelopment project. After I determined that such interest did exist, the Agency authorized advertisements in the Santa Rosa Press-Democrat and the San Francisco Chronicle to solicit proposals from developers with experience in developing regional shopping centers.

2.02 Three developers responded to advertisements

published on March 1 and March 5, 1972, and were interviewed by the Agency staff and liasion committee on March 20, 1972.

2.03 On March 27, 1972, the Agency, after considering the report of its staff, authorized an agreement with Ernest W. Hahn, Inc. ("Hahn"), which provided for a 120 day period of exclusive negotiations between the Agency and Hahn during which Hahn would bear the cost of preparing a detailed proposal for the development of a regional shopping center.

2.04 On July 24, 1972, after hearing a progress report, the Agency extended the exclusive negotiations period by nine months. At the end of that period, Mr. Ernest W. Hahn informed the Agency that negotiations with two major department stores had reached the stage where it was necessary for Hahn and the Agency to enter into a predisposition to insure the stores' participation in development. He requested an additional 60 to 90 days in order to give attorneys time to prepare the predisposition agreement. On August 6, 1973, at the close of a noticed public hearing, the Agency approved and executed an agreement with Hahn entitled "Interim Agreement and Proposal to enter into a contract for sale of land for private development in Santa Rosa Center Project (Calif. R-45)". By the terms of the predisposition agreement, the Agency and Hahn agreed to enter into a future agreement for the disposition of land and development of a shopping center upon the satisfaction of several conditions, one such condition being the amendment of the existing redevelopment plan to add the area now referred to as Phase III. Under the agreement as proposed and later

executed Hahn is to acquire approximately 12 acres of Phase II and 9 acres of Phase III.

3. AMENDMENT OF THE SANTA ROSA REDEVELOPMENT PLAN

3.01 During the latter half of 1973 and in 1974, the Agency staff and special consultants conducted various studies of the Phase III area to determine its eligibility for redevelopment. These studies included a four-volume environmental impact report (EIR) prepared by URS Research Company, a structural engineering survey of the buildings in Phase III by Leonard S. Mosias & Associates, a financial analysis by Blyth, Eastman, Dillon & Company, and staff and City Agency investigations on relocation problems and social conditions within the area. As a result of these studies and investigations, the Agency prepared proposed amendments to the redevelopment to add Phase III and change street patterns in Phase II to accomodate the shopping center. The proposed amendments were processed in accordance with the requirements of the Community Redevelopment Law and approved by the City Planning Commission.

3.02 On December 31, 1973 and January 7, 1974, the Agency published notice that a draft EIR for the project had been prepared and was available for inspection by the public at the Agency office, that written comments could be submitted on the draft EIR until February 1, 1974, and that comments could also be made by appearance at a public hearing of the Agency to be held on January 28, 1974. The Agency responded to the comments and held a hearing on the final EIR on

October 16, 1974. The hearing was continued to October 29, 1974, at which time the Agency voted unanimously to certify the EIR as an EIR complying with the California Environmental Quality Act (CEQA).

3.03 At a second noticed public hearing held on October 29, 1974, the Agency considered the proposed contract with Hahn ("the Hahn contract") for sale of the shopping center site, which implemented the contingent proposal of the earlier predisposition agreement. The Agency tentatively approved the Hahn contract subject to concurrence by HUD. The administrative record of that hearing was prepared by the Agency and lodged with the Sonoma County Superior Court in connection with the action entitled *Codding Enterprises, et al.* v. *Urban Renewal Agency of the City of Santa Rosa, et al.*, Sonoma County Superior Court Action No. 79762. Exhibit A to this affidavit is a true copy of that administrative record with exception that it does not include the final EIR for the project, the "Interim Agreement", or the Hahn contract as tentatively approved by the Agency. The tentatively approved Hahn contract is identical in all respects, except the time schedule for performance, to the Hahn contract finally approved by the Agency that is attached to this affidavit as part of Exhibit D.

3.04 At a joint public hearing on October 29, 1974, the City Council and Agency considered the two proposed amendments of the redevelopment plan. Prior to the hearing, I prepared and submitted to the members of the City Council a report to City Council, a true copy of which is attached to this affidavit as Exhibit B. This report summarized the numerous studies of consul-

tants, City departments, and the Agency staff concerning the characteristics of Phase II and its eligibility for inclusion within the project. The City Council also considered the final EIR for the project, which earlier the same day had been certified by the Agency as completed in compliance with CEQA, including the EIR's special market studies prepared in response to the suggestion that the proposed shopping center would monopolize trade in the Santa Rosa area and inflict competitive injuries on other retail establishments. A true copy of that market study is attached to this affidavit as Exhibit C.

3.05 At the joint hearing on October 29, I and my staff explained the Report to the City Council and oral testimony was given on the matters summarized in the report. After comments and testimony by members of the public, including the attorney for Codding Enterprises, the council adopted Ordinance No. 1741 adding Phase III to the project. Action on the amendment relating to Phase II streets was deferred pending concurrence by HUD because the loan and grant contract providing federal assistance to Phase II required such review and concurrence by HUD. Although the Phase II amendment and Hahn contract were promptly submitted for concurrence, I was informed by HUD officials that such concurrence would not be given until an environmental impact statement (EIS) was completed for the federally assisted project.

4. APPROVAL OF THE HAHN CONTRACT

4.01 In April of 1975 the Agency received, and commented on, the draft EIS for the project. In late summer, the Agency received a copy of the final EIS. At or about the time of cmpletion of the final EIS, I was advised, in discussions with Mr. Michael Daugherty of HUD, that another reuse appraisal should be prepared for the shopping center site because of the lengthy delay in concurrence. Reuse appraisals had previously been prepared by William Niethammer, M.A.I., of Niethammer & Myers in 1970, and by Richard U. Ratcliff, PhD, in November of 1972.In addition, a reuse appraisal for one parcel in the area had beer prepared by Conger & Fisk in January of 1972 and a study, review, and analysis summarizing past appraisals prepared by David E. Lane in June of 1973. All of the foregoing appraisals were submitted to HUD for its review; none of the appraisals indicated that the price of land to be paid by Hahn or the consideration to the Agency of the Hahn contract was inadequate or less than fair market value or fair value for uses in accordance with the redevelopment plan. All of these reuse appraisals were produced by me and presented to plaintiffs, the attorneys for plaintiff, Mr. Brinton and Mr. Hecht, at my deposition in this action on February 4th and February 5, 1975.

4.02 The new reuse appraisal David E. Lane was completed on October 1, 1975 and promptly submitted to HUD. In October Mr. Johnson, the HUD appraiser, visited the Agency to review the data included in the Lane appraisal. On about November 7, 1975, the Agency received HUD concurrence for the Hahn contract by letter from Mr. Salvatore Tedesco, Director of the San Francisco based Technical Services Branch of HUD. The same letter concurred in the Hahn contract

cash price for disposition of Phase II land.

4.03 Prior to HUD concurrence in the Hahn contract and its disposition price, HUD separately concurred in the Phase II plan amendment. The City Council again considered the amendment and adopted it as Ordinance No. 1791 on November 4, 1975.

4.04 On November 14th and November 21, 1975, the Agency published notice that it would hold a public hearing on December 1, 1975 to take final action on the Hahn contract. At that hearing the Agency received the Lane appraisal and Mr. Lane's unrebutted testimony on the appraisal conclusion, that the fair value of the property for reuse was $2.00 per square foot, substantially less than the price to be paid by Hahn. The Agency also considered the other testimony and evidence which is set forth in the transcript included as part of Exhibit D. No appearance was made at the hearing on behalf of plaintiff, nor was conflicting appraisal evidence offered. At the close of the hearing, the Agency unanimously approved the Hahn contract after finding the consideration from Hahn was not less than fair value for reuse in accordance with the plan. The administrative record of the hearing held on December 1, 1975 was prepared and lodged with the Sonoma County Superior Court in connection with the validating proceedings on the amendments to the redevelopment plan. Exhibit D to this affidavit is a true copy of that administrative record, except that it does not include the project EIS which was presented to the Agency at the hearing.

5. CONCLUSION

The foregoing matters are true of my own personal knowledge, and, if called as a witness, I can competently testify thereto. This affidavit is submitted in Support of the Motion for Summary Judgment and Motion to Dismiss of Defendants City of Santa and the Urban Renewal Agency of the City of Santa Rosa.

DATED: August 19, 1976

JAMES K. BURNS

STATE OF CALIFORNIA
COUNTY OF SONOMA

On _____, 1976, before me, a Notary Public, personally appeared JAMES K. BURNS, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

_____

EXHIBIT A

URBAN RENEWAL AGENCY OF THE CITY OF SANTA ROSA
SPECIAL MEETING
October 29, 1974
MINUTES

Convened The members of the Urban Renewal Agency of the City of Santa Rosa met in Special Meeting at 1:00 p.m. in the City Council Chambers, City Hall, Santa Rosa, California, on the 29th day of October 1974.

The Chairman called the meeting to order, and on roll call, the following answered present: Chairman Ted Grosman, Vice Chairman George B. Schmoll, Mr. Frederick L. Browne, Mr. Michael Panas, and Mr. George R. Sutherland, Jr.

Others present included: Executive Director James K. Burns, Special Counsel Joseph E. Coomes, Jr., General Counsel Richard B. Maxwell, and other Agency staff members.

****

Public Hearing - Hahn Agreement Executive Director Burns reported that the Notice of this hearing was advertised in the Press Democrat on October 14 and October 21, and he submitted the Proof of Publication for the record. Mr. Burns then briefly reviewed the events leading to this public hearing such as the solicitation of regional shopping center developers, the signing of the Exclusive Negotiations Agreement with the Hahn Company, and the Interim

Agreement. Mr. Burns introduced Mr. Ernest W. Hahn, Chairman of the Board of Ernest W. Hahn, Inc.

Mr. Hahn stated that substantial progress has been made during this time of negotiations and he praised the community for providing input into the design of the shopping center. Mr. Hahn mentioned that he has had the privilege of seeing literature regarding the shopping center — both pro and con — and he thought it would be appropriate to comment at this time on the erronious nature of statements being made concerning subsidies.

Mr. Hahn referred to the California Redevelopment Act and its purpose. He stated that a strong retail downtown is necessary in order to provide further taxable growth and that a city cannot revitalize its downtown without the polarization of regional department stores. As to statements made by Codding Enterprises that the figures in the EIR were incorrect, Mr. Hahn reported that it takes 4.5 square feet of conventional department store space to satisfactorily serve the needs of each person. With Santa Rosa's primary and secondary trade area, Santa Rosa is deficient in this category and can use additional department stores. Mr. Hahn noted at this point that a third major high-line department store consisting of some 80,000 square feet will be added to the shopping center within a year or two after completion of the facility. Mr. Hahn suggested that it would be to Santa Rosa's

advantage to keep the shoppers in Santa Rosa and not in their automobiles driving to San Francisco to shop.

Mr. Hahn produced a "Heritage Square" brochure which contends that Macys and Sears would be included in that project. He reported that he had recently discussed the statement made in the brochure with both Macys and Sears and was told they are definitely not interested in this concept — not now or at any future date — even if the Hahn project were not developed. These majors are only interested in locating stores in a modern, up-to-date facility that would be integrated with downtown.

Mr. Hahn briefly reviewed the anticipated costs of the shopping center and advised that this center constructed downtown will cost approximately $6,000,000 more than one constructed in a suburban area. Some of the reasons for this is the No. 1 fire zone, more vertical transportation, parking structures, etc. This means that the rental structure will be somewhat higher and that the developer will have to absorb some of the increased costs out of the profit. He pointed out that this subsidy from the developer by far exceeds any subsidy from the redevelopment agency in the way of project improvements.

He further advised that existing businesses in the Santa Rosa area will benefit from the increased retail activities generated by the shopping center. He also pointed out that there are

many people in the Santa Rosa area who hold Macys credit cards and are apparently shopping in other communities. With a Macys here in Santa Rosa, the money will stay in Santa Rosa.

Referring again to the Heritage Square model on display, Mr. Hahn stated that many buildings depicted in the model are nontaxpaying structures, and to say the project can be built without the use of general obligation bonds is irresponsible.

Mr. Hahn concluded by repeating the fact that Sears and Macys are financially involved in the downtown Hahn project, and that he is ready to proceed in a constructive manner to build one of the finest developments in the area.

****

Adjournment There being no further business to come before the Agency at this meeting, the Chairman adjourned the meeting.

M.E. KARAGAN
Recording Secretary
APPROVED: Ted Grosman
Chairman

ATTEST: James K. Burns
Secretary

****

EXHIBIT D
SANTA ROSA COMMUNITY DEVELOPMENT COMMISSION
SPECIAL MEETING
DECEMBER 1, 1975
MINUTES

Convened The members of the Santa Rosa Community Development Commission met in Special Meeting at 4:00 p.m., on the 1st day of December 1975, in the City Council Chambers, City Hall, Santa Rosa, California.

The Chairman called the meeting to order, and on roll call, the following answered present: Chairman Ted Grosman, Commissioners Frederick L. Browne, Michael Panas, and George R. Sutherland, Jr. Vice Chairman George B. Schmoll was absent.

Others present included: Executive Director James K. Burns, Special Counsel Joseph E. Coomes, Jr., General Counsel Richard B. Maxwell, and other Commission staff members.

****

Appraiser David E. Lane reviewed the process involved in preparing his reuse appraisal of the shopping center site, and following thorough investigation and analysis, concluded that the fair market value of the land would be $2.00 per square foot, or $2.6 million for the 30 acres to be sold to the Hahn Company. Mr. Lane also determined that the highest and best use of the site would be a regional shopping center constructed as a single project. He noted that if the property was sold in small parcels, it would take

a minimum of ten years to develop the area. Mr. Lane indicated that the economic benefits to the community would be great in terms of values, rents, and gross retail sales when the shopping center is completed.

Mr. Ernest W. Hahn, Chief Executive Officer of Ernest W. Hahn, Inc., was present at the meeting and stated that since the last hearing in October 1974, the design of the shopping center has had constant study by the Commission and the City Design Review Board. As a result, B Street was changed to encourage activity between the proposed center and the existing downtown retail area, and a pedestrian extension has been planned through Fourth Street to Railroad Square. Further, Macy's will be somewhat larger, and negotiations are continuing for a third major department store. In response to allegations made regarding "subsidy", Mr. Hahn proceeded to compare the cost of developing a suburban shopping center versus the cost of developing a shopping center downtown. It was found that the downtown center will cost the Hahn Company about $5.6 million more than it would if he developed the center in a suburban area. He noted that each day lost in moving this project forward costs a minimum of $10,000 in cost increases, or $3.7 million per year, plus loss of substantial revenue to the taxing agencies. Also, construction of the center will employ 2,000 to 2,500 construction workers and suppliers, and upon completion, there will

be permanent employment for 2,000 persons. In conclusion, Mr. Hahn pledged continued support and cooperation, and stated he is anxiously awaiting the signing of the final documents.

****

Executive Session The Chairman recessed the meeting at this time for an executive session.

Adjournment Following the executive session, the meeting was adjourned. (Item No. 11 on the agenda was held over for the next meeting).

M.E. KARAGAN
Recording Secretary

****

APPRAISAL REPORT
of

SANTA ROSA CENTER PROJECT
(Calif *R*-45)
RE-USE VALUES
Phase II and Phase III

for

SANTA ROSA COMMUNITY DEVELOPMENT COMMISSION
as of
October 1, 1975
by
DAVID E. LANE, MAI, SREA
Real Estate Appraiser

October 10, 1975

Mr. James K. Burns
Executive Director
Santa Rosa Community
Development Commission
P.O. Box 1678
Santa Rosa, CA 95403

Re: Re-Use Appraisal Santa Rosa Center Project

Dear Mr. Burns:

Please refer to my appraisal report dated October 1, 1975, relating to Phase II and Phase III re-use values. Inadvertently omitted from that report was the following limiting condition:

> The Redevelopment Plan permits apartments to be developed in a portion of the Project, although the basic land use is designated commercial. Since

this residential use is a lower one, insofar as values are concerned, no specific investigation has been made relative to a value for residential use of the area between First and Third, "A" and "B" Streets.

In addition to the above, please note the following corrections or comments:

On page 9, fourth line from the bottom, "Stowair Inc." should read "Stol Air Commuter."

On page 27, under "Flamingo One Stop Shopping Center." Omitted from the text is the fact that Long's Drugs is a prime tenant in the center.

On page 36, third paragraph, it is stated that the "price for the corner of Third and "B" is *$8.00* per square foot." The $8.00 per square foot should refer to the corner of *Fourth* and "B", which is Parcel DD, and which is part of the same disposition arrangement for the relocation of the Wells Fargo Bank to Third and "B". The latter corner, which is presently a City parking lot, is being acquired from the City for $300,000 for a net area of 26,337 square feet, or *$11.39* per square foot.

The above is for the purpose of clarification only. My conclusion as to the inapplicability of these prices to the subject evaluation is still valid, i.e., that this development is a result of the Hahn regional shopping center proposal, and these prices are an indication of the effect of such a development on land nearby. They are not relative to valuing the shopping center land itself.

If I can be of any further assistance, please advise.

Sincerely,

DAVID E. LANE, MAI, SREA

October 1, 1975

Mr. James K. Burns
Executive Director
Santa Rosa Community
Development Commission
P.O. Box 1678
Santa Rosa, CA 95403

Re: Re-Use Appraisal, Santa Rosa Center Project

Dear Mr. Burns:

Pursuant to your request, I have made an investigation and analysis relative to estimating the re-use value of 30 acres lying in the Santa Rosa Center Project.

It is my opinion that the fair values for re-use in accordance with the Redevelopment Plan of said Project, are as follows:

Phase II (21 acres)	$1,829,520
Phase III (9 acres)	784,080
Total	$2,613,600

The above values are based on a unit value of $2.00 per square foot, or $87,120 per acre. Other principal findings and conclusions are:

(a) The highest and best use of the 30 acres is for a regional shopping center;

(b) In the absence of such a use, the holding period until completion of land disposition is about ten years;

(c) The financial terms of the Hahn contract are of substantial benefit to the Santa Rosa community and, in particular, to the central business district; and

(d) Given the unique location and the right timing with respect to the need for a regional shopping center

in the trade area, no marketing program is necessary to dispose of the property.

You will find the reasoning for the conclusion of value and the findings on the pages following.

Thank you for the opportunity of making this appraisal.

Respectfully submitted,
DAVID E. LANE, MAI, SREA

****

HAHN CONTRACT

In addition to valuing the land in Phases II and III under the restrictions and requirements of the Redevelopment Plan, I have been requested to analyze its value considering the specific terms of a proposed contract with Ernest W. Hahn, Inc., developer, and considering the schematic plans prepared by that developer for a regional shopping center.

The pertinent terms of the contract are assumed to be as follows:

(a) Hahn is to pay $3 million for the 30 acres;

(b) Hahn is to construct a regional shopping center of initially a minimum of 597,600 square feet of gross leasable area with at least two major department stores, and ultimately not less than 673,200 square feet with three department stores;

(c) Hahn is to construct surface parking spaces and parking structures at a fixed cost to the Commission of $2 million;

(d) Hahn is to reconvey the parking areas, which will be operated and maintained by the City; and

[1](e) Hahn is to pay $.49 per square foot of gross leasable area or $401,000 per year, whichever is greater, to cover in-lieu taxes, operation, and maintenance of the parking, which is to be free to the public throughout the downtown area; this increases to not to exceed $.65 per square foot in the 11th-20th years.

---

[1]NOTE: Under an alternative "B" of the contract, the Commission would have the option of conveying the Phase III land without cost, and making a $1 million contribution in site improvements, with the developer paying all costs of construction, operation, and maintenance of the parking. The economic result appears to be the same.

Details of the proposed shopping center are described hereinafter. They are based on a "schematic proposal" prepared by John S. Bolles Associates Architects on September 17, 1975.

They provide for a two-level enclosed mall of 120,640 square feet; a Sears store of 161,342 GLA, including TBA; a Macy's store of 126,000 GLA; a third department store of 75,600 GLA; 350,000 GLA in four mall buildings; 20,163 square feet in theater and shops; and 533,900 square feet in the two floors of three-level parking structures with total on-site spaces of 2,834 (including 2,200 in the structures) and an additional 651 spaces off-site.

The gross leasable area totals 733,105 square feet.

HAHN PROPOSED IMPROVEMENTS

The major portion of the project consists of 7 two-story retail sales buildings joined together by a two-level, enclosed air-conditioned pedestrian mall. The mall runs in a north-south direction with the facade of the shopping center facing "B" Street. Two 3-level parking structures are located between the mall buildings and Freeway 101. Two single-story buildings to house small retail shops and two theaters are located on either side of the main pedestrian entrance to the shopping center at Fourth and "B" Streets. From this point a pedestrian walkway runs through the shopping center west to Morgan Street. A one-story structure located to the south of the parking structures will house a TBA facility (tires, batteries and accessories). The first story of all structures is at grade level.

Automobile entrances to the parking areas are from

the Highway 101 off-ramp, First Street, Third Street, Seventh Street, Morgan Street, "A" and "B" Streets. Access to service driveways located between the main buildings and the parking structures is from First Street, Third Street, and the corner of "A" and Sixth Streets.

A portion of the two-story main shopping center complex will span across Third Street, which is to be depressed below grade. The decking of the depressed street area and the improvement of the air rights is a responsibility of the developer.

Primary tenants of the shopping center to date are Macy's, which will be located at the north end of the mall and Sears, which will be located at the south end. Intervening structures located off the enclosed mall are labeled; Future, A, B, C & D. The structure labeled "Future" will house the third major retail store of the complex. Structures A, B, C & D will house smaller retail shops offering goods and services. The TBA facility will be operated by Sears. The two structures on either side of the main pedestrian entrance will house small retail shops and two theaters with a total seating capacity of 736.

Gross leasable area of the shopping center is 733,105 square feet, including the theater. The breakdown is:

	Gross Leasable Area
Sears (including TBA)	161,342
Macy's	126,000
Future	75,600
Building "A"	77,600

Building "B"	41,030
Building "C"	119,030
Building "D"	112,340
Fourth Street Shops	10,800
Theater	9,363
	733,105 sq. ft.

The enclosed mall contains a gross area of 120,640 square feet.

The architect calculates total off-street parking of 3,485 spaces, tabulated as follows:

Parking Structure No. 1 (3 levels)	1,397
Parking Structure No. 2 (3 levels)	803
On-site grade parking	634
Total on-site parking	2,834
Freeway-site parking	163
Off-site parking	488
Total available	3,485 spaces

The area of the parking structures is 533,900 square feet. The ratio of total parking spaces to GLA is 4.75 per 1,000 square feet of total retail space, including the theater. The architect calculates 5.23/1,000 based on net sales areas of the mall stores only. Using the on-site spaces only of 2,834, the ratio is 3.87/1,000.

COST OF SHOPPING CENTER

Based on the schematic layout, any estimate of the cost of constructing the Hahn project involves very rough figures only. My estimates are based on the following:

Site preparation:	
Relocate aqueduct	$300,000

Bridge 3rd Street	500,000
General site work	150,000
Total, site preparation	$ 950,000
Buildings:	
Department stores:	
341,450 s.f. @ $30/s.f.	10,243,500
TBA (Sears)	
21,492 s.f. @ $18/s.f.	386,856
Mall shops:	
350,000 s.f. @ $32/s.f.	11,200,000
Enclosed mall:	
120,640 s.f. @ $15/s.f.	1,809,600
Entrance shops:	
10,800 s.f. @ $28/s.f.	302,400
Theater:	
9,363 s.f. @ $37/s.f.	346,431
Parking structures:	
533,900 s.f. @ $13/s.f.	6,940,700[1]
Surface parking, landscaping	850,000
Total direct costs	$33,029,487
Plus indirect costs:	
Pre-development expenses, taxes and interest during construction, etc.: 10%	+ 3,302,949
	$36,332,436
Less contribution to parking	− 2,000,000
Net cost to developer	$34,332,436
Say	$34.5 million

[1]Equals $3,155 per space, including ground level. This cost is very dependent upon the quality and design of the garage. The estimate is considered a median figure.

Although the parking is to be publicly-owned and operated, the developer under the contract is obligated to construct the surface parking and construct or guarantee the construction of the structures at a cost to the Commission of not to exceed $2 million. Therefore, the latter amount must be deducted from the total capital cost of the Hahn development, but almost $5.5 million attributable to parking must be left in, since the developer is responsible for constructing the parking, even though he will not own or operate it.

The estimated cost of the structures, at $6,940,700, equals $3,155 per space for the 2,200 spaces in the garage buildings. Added to this is another $400,000 for 634 on-site surface spaces, for a total of $7.34 million. It is assumed that the 651 "off-site" spaces will be paid for by the City or others.

Therefore, only about $27 million of the $34.5 million estimated cost of the improvements would be depreciable assets (under alternative "A" of the contract).

RESIDUAL ANALYSIS

In this analysis, an estimate of the economic rental value is made, and to arrive at a net annual income stream, deductions are made for vacancy allowance, taxes, insurance, maintenance, management, other operating expenses, and depreciation and interest on the improvements. The resulting residual income represents some indication of a land value.

This analysis, because it involves considerable estimating and judgment factors, is used primarily for the purpose of being a check on the other methods, and

for establishing a reasonable range within which the land price should fall, considering the specific proposed project.

Estimated annual gross income:		
Department stores:		
341,450 s.f. @ $3/s.f.		$ 1,024,350
TBA (Sears):		
21,492 s.f. @ $2/s.f.		42,984
Mall shops:		
350,000 s.f. @ $9/s.f.		3,150,000
Entrance shops:		
10,800 s.f. @ $12/s.f.		129,600
Theater:		
736 seats @ $100/seat		73,600
Total annual gross		$ 4,420,534
Less vacancy allowance: 2%		− 88,410
Effective gross income		$ 4,332,124
Expenses:		
Taxes	$900,000	
Insurance	35,000	
Building maintenance	40,000	
Parking in-lieu payment	401,000	
Utilities	100,000	
Advertising & promotion	75,000	
Management	150,000	
Total expenses		−1,701,000
Net to land & improvements		$ 2,631,124
Improvement charges:		
$27 million cost, excluding parking: 7.5% return + 2% recapture = 9.5% × $27 million		−2,565,000

Net to land	$ 66,124
$66,124 capitalized at 7.5% =	$ 881,653

$881,653 ÷ 30 acres = $29,388/acre, or $.67/s.f.

Because of the small ratio of residual land value to total capital investment, the foregoing analysis is not used as a direct indication of value. Note that an increase in the interest rate from 7.5% to just 7.75% would wipe out all of the residual ($27 million times .0975 = $2,632,500 vs. net of $2,631,124). Also, all of the figures are still rough estimates only.

It should also be recognized that the rents in the project are more a function or result of costs rather than comparison with existing rates in the community. This is because of the unique nature of the center, its customer drawing power, the presence of the department store magnets, its monopoly position, and the fact that, within obvious limits, the rents have to be commensurate with the costs involved, or the project cannot be built.

CONCLUSION OF VALUE

Value Under the Plan

The indication of value from larger sales and listings is *$2.00* per square foot.

The indication of value from subdividing the land into average 20,000-square foot parcels is $3.00 per square foot, assuming a lengthy selling period. This would probably involve no more than 30 parcels, assuming about half the area would be in surface parking. The configuration of the parcels would be quite awkward and uneconomic, however, because of the

Plan's closing of most of the interior streets ("A", Second, Fourth, and Fifth).[1] It would leave too much depth in most instances, unless the parking was scattered in small lots throughout the project, thereby utilizing the large rear areas.

To sell 30 parcels, given the assumption of no new regional shopping center going downtown, would take an estimated ten years, or an average of three parcels per year.

Assuming holding costs of 12% (3.5% taxes and 8.5% interest), the present worth of receiving 1/10th of the disposition proceeds each year for 10 years equals:

Factor 5.650 times $.30 = *$1.70*/s.f.

The factor represents the present worth of $1 per annum discounted at 12%. The $.30 represents 1/10th of the value per year ($3.00 × 10%). The $1.70 per square foot represents a present average cash value of the land.

Not reflected in the above calculations is the possibility of increasing land values as time goes by, so that holding costs might be offset somewhat. Other projects, however, which have not involved a regional center and where timing of new construction has been poor, have experienced the reverse situation with respect to typical retail commercial redevelopment areas, i.e., declining values for the undeveloped land.

It is my opinion that in the absence of the regional shopping center approach, most of the subject land would remain a wasteland of open space for a long

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[1]Based on latest Land Use Map, which has been approved by the Commission and HUD, but not by the City Council as yet.

period of time.

It is my conclusion that the market value of the subject 30 acres, considering all conditions of the Redevelopment Plan, is:

30 acres × 43,560 s.f. = 1,306,800 s.f. @ $2.00/s.f. =	$2,613,600
Allocated:	
Phase II: 70% (21 acres)	$1,829,520
Phase III: 30% (9 acres)	$ 784,080

Effect of the Hahn Contract

There are both tangible and intangible benefits to the Commission and the City under the Hahn contract, making it difficult to measure them in the sense that a dollar value can be established.

The $3 million to be paid by Hahn is more than a fair price to the City and the Commission, especially when consideration is given to the obligations on the part of Hahn to (a) pay for two 3-level garages in excess of the $2 million Commission contribution; (b) construct all on-site surface parking; and (c) contribute at least $401,000 per year to the parking district.

My cost analysis (see page 61) indicates that almost $5.5 million will be the net cost to the developer for the parking, after deducting $2 million for the Commission's contribution.

In addition, the City will receive $401,000 "in-lieu payment", which sum is reportedly enough to cover in-lieu taxes, operating expenses, maintenance, and provide free parking throughout the downtown area.

The estimated $5.5 million net cost is a necessary

expenditure to get vertical parking in a tight area of only 30 acres for a regional shopping center. If this were a typical suburban center, the developer would install the 3,485 parking spaces (including those which are "off-site") on the ground level spread over his acreage, probably covering another 30 acres. His costs for this would probably not exceed $1,000 per space, including the extra land needed, or $3.485 million. Therefore:

Hahn parking costs	$5.5 million
Suburban center parking	−3.5 million
"Extra" parking costs to Hahn	$2.0 million

It should be noted that the surface parking and parking structures, although primarily financed by Hahn, will be in the control of the parking district as public parking (under alternative "A"), and as such will be available to serve an area broader than the proposed shopping center alone.

The only real alternative to the Hahn contract, other than securing another developer under basically the same terms, would be to construct surface parking lots on about half the acreage and build on the other half. There is a problem here, however, since the Plan calls for only 25% land coverage on the Central Business "C" blocks along the freeway, unless they are used for parking. In the absence of using the shopping center concept, this places the parking too far from the parcels that could be built on in Central Business "D" east of "A" Street.

In any event, the following rough analysis is made in order to confirm the conclusions made of the Hahn contract:

Of the 1,306,800 square feet (30 acres), about 794,000[1] of them would be required for parking, landscaping, etc. if all of it is ground-level only, and if the same Hahn ratio of 3.87/1,000 (on-site only) were to be maintained. This leaves 512,800 square feet for buildings. This compares to 733,105 under the Hahn plan, a loss of 220,305 square feet by not building vertically. The number of spaces would be 1,985 (512.8 × 3.87), a reduction of 849 from the Hahn on-site parking total of 2,834.

Assuming 350 s.f. per space in public parking areas, then 694,750 square feet of land would be required, leaving 612,000 square feet of land area to be sold for private development.

The conclusions to be drawn from the foregoing comparisons are as follows:

1. The regional shopping center concept would probably generate over 200,000 additional square feet of building area.

2. It would provide over 800 more parking spaces. (Note: This is quite conservative, because the ratio of parking to building area under the small-parcel method would probably be much less than the 3.87/1,000 derived from the intensive retail development of Hahn. This does, however, release more land for building area if the ratio is less.)

3. The smaller-parcel concept, whereby parking would be built in stages, means that there would probably be no free parking and the City would have to continue to tax in order to get funds for land acquisition from the Project; construction; maintenance; and operating expenses.

[1] 3.87 × 400 s.f. (includes setbacks, landscaping, walks) = 1.548 s.f. of open space for each 1,000 s.f. of building. 1,306,800 divided by 2.548 = 512,873 s.f. of building. 1,306,800 less 512,873 = 793,927 s.f. of open land.

4. Only 47% (612,000 s.f. ÷ 1,306,800 s.f.) of the 30 acres would be in private ownership for taxation purposes, compared to about 19 acres, or over 63% under the Hahn contract. (But because of the $401,000 in-lieu payment, the tax situation is actually much better than if the 11 acres were in private ownership.)

5. With a parking cost of about $7.5 million, if this part of the project remained in private ownership, the total taxes generated for the community would be approximately $262,500 ($7.5 million times 3.5%). This compares to the in-lieu payment of $401,000 annually under the Hahn contract.

6. In addition to the much higher amount of general taxes generated by the higher-valued and more extensive construction under the regional shopping center approach, the $1 per $100 of assessed value tax for the parking district would probably generate only the following compared to $401,000:

612,000 s.f. of private land @ $3/s.f.	$ 1,836,000
512,800 s.f. of buildings @ $30/s.f.	15,384,000
Total value, as smaller parcels	$17,220,000

$17,220,000 × 25% = $4,305,000 assessed value = $43,050 × $1 = $43,050 per year.

The above does not include the taxes from fixtures

and personal property; however, it also does not reflect the substantial discount for time. Unless the rate were substantially increased, it is far below the guaranteed $401,000 under the Hahn contract.

7. In addition to completing and closing the project much faster, the Commission would be dealing with one entity only for ease of planning, design, and coordination. There would be no need to "market" the land, because its location and the economics of the area establish its highest and best use as a regional shopping center.

8. The placement of two to three department stores on this land will have a tremendous beneficial impact on values of surrounding downtown property. These are fringe benefits, not immediately measurable in terms of dollars. But this fact is an important consideration insofar as the determination of the concept of development of the 30 acres is concerned. There may be some dislocation in the older CBD to the east, but it should not be too great (nor long-lasting) because of the proximity of the project to the existing good retail area.

Final Conclusion

It is therefore my conclusion that the fair re-use value of the land described herein, subject to the limiting conditions hereof, is as follows:

1,306,800 s.f. @ $2.00/s.f. =	$2,613,600
The above estimate is allocated:	
Phase II: 70% (21 acres)	$1,829,520
Phase III: 30% (9 acres)	$ 784,080

The above estimates are subject to change after a survey of the exact areas involved. The $2.00 per square foot is considered to be the constant amount.

CERTIFICATION

The undersigned does hereby certify that, except as otherwise noted in this appraisal report:

1. I have no present or contemplated future interest in the real estate that is the subject of this appraisal report.

2. I have no personal interest or bias with respect to the subject matter of this appraisal report or the parties involved.

3. To the best of my knowledge and belief the statements of fact contained in this appraisal report, upon which the analyses, opinions and conclusions expressed herein are based, are true and correct.

4. This appraisal report sets forth all of the limiting conditions (imposed by the terms of my assignment or by the undersigned) affecting the analyses, opinions, and conclusions contained in this report.

5. This appraisal report has been made in conformity with and is subject to the requirements of the Code of Professional Ethics and Standards of Professional Conduct of the American Institute of Real Estate Appraisers of the National Association of Real Estate Boards.

6. No one other than the undersigned prepared the analyses, conclusions and opinions concerning real estate that are set forth in this appraisal report.

DAVID E. LANE, MAI, SREA

****

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Attorneys for Defendants

United States District Court
Northern District of California
Civil Action No. 74-2429 RHS

City of Rohnert Park, a municipal corporation,
Plaintiff,

v.

James T. Lynn, as Secretary of the United States Department of Housing and Urban Development, City of Santa Rosa, a municipal corporation, Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic, and Ernest W. Hahn, Inc., a California corporation,
Defendants.

AFFIDAVIT OF RICHARD E. BRANDT
IN SUPPORT OF MOTION FOR SUMMARY
JUDGMENT AND MOTION TO DISMISS

STATE OF CALIFORNIA
COUNTY OF SACRAMENTO

RICHARD E. BRANDT, being duly sworn, deposes and says:

1. I am an attorney at law and admitted to practice before the courts of the State of California and the United States Federal District Court for the Northern District of California. During the past three years, I and Joseph E. Coomes, Jr., of the same firm have represented the City of Santa Rosa and the Urban Renewal Agency of the City of Santa Rosa (now known as

"the Santa Rosa Community Development Commission") in several law suits filed involving the downtown Santa Rosa redevelopment project and certain other matters.

2. Among the suits in which I have participated as attorney for the City and the Agency are this suit, *City of Rohnert Park* v. *James T. Lynn, et al.; Codding Enterprises, et al.* v. *Urban Renewal Agency of the City of Santa Rosa, et al.*, Sonoma County Superior Court, Action No. 79762; and *Codding Enterprises* v. *Santa Rosa Community Development Commission, et al.*, Sonoma County Superior Court Action No. 84237. This firm also represented the City of Santa Rosa and the Agency in *City of Santa Rosa and The Urban Renewal Agency of The City of Santa Rosa* v. *City of Rohnert Park*, Sonoma County Superior Court Action No. 78756, referred to in the complaint in this action.

3. Sonoma County Superior Court Action No. 79762 is a validating proceeding challenging the validity of Ordinance No. 1741 of the Santa Rosa City Council, which amended the redevelopment plan for the Santa Rosa downtown project to include the area known as Phase III within the project area. Exhibit A to this affidavit is a true copy of the First Amended Complaint in Action No. 79762, the last pleading of plaintiff in the suit other than a supplemental complaint adding the allegation the Ordinance was invalid for an alleged conflict of interest. Exhibit B to this affidavit is a true copy of the summons and proof of publication required by Section 860, et seq., California Code of Civil Procedure for in rem jurisdiction in such a validating proceeding.

4. Sonoma County Superior Court Action No. 84237 is also a validating proceeding. Action No. 84237 involves the validity of Ordinance No. 1791, which amended the redevelopment plan by closing streets and changing traffic patterns in Phase II to accommodate the proposed regional shopping center development of Ernest W. Hahn, Inc. Exhibit C to this complaint is a true copy of the Complaint for Injunction and Declaratory Relief in that action, the last pleading in the suit by plaintiff. Exhibit D is a true copy of the summons and proof of publication filed in connection with Action No. 84237.

5. Action No. 79762 and Action No. 84237 were consolidated for trial with two other actions filed by Codding Enterprises against the City of Santa Rosa and the Agency involving the downtown redevelopment project. The consolidated case was heard before the Honorable J. Hilary Cook on May 17-19, 1976. On July 28, 1976, Judge Cook filed his Notice of Intended Decision in that case, a true copy which is attached hereto as Exhibit E.

6. Codding Enterprises alleges in the First Cause of Action of the First Amended Complaint in Action No. 79762 that the contract between the Agency and Hahn is a sale of the shopping center site for less than adequate consideration as measured by the standards of 42 USC 1460(c) (4), the Urban Renewal Handbook of the Department of Housing and Urban Development ("HUD"), and Section 33433 of the California Health and Safety Code. The Sixth Cause of Action of the same pleading alleges that the contractual arrangements between Hahn and the Agency and the proposed

use of tax allocation financing for public costs of the project constitute a contract, conspiracy or combination in restraint of trade, a monopoly, an attempt to monopolize, and unfair competition. At the trial of the consolidated Superior Court actions, evidence was offered to the court on both causes of action, and the issues raised by them argued before the court.

7. On November 11, 1975, I attended the deposition in this action of Mr. Leevern Johnson, real estate specialist of HUD, which was noticed and taken by the attorneys for plaintiff. The review by HUD of the Hahn contract and the shopping center site appraisal of David Lane, M.A.I. was the principal subject of questioning at that deposition; Mr. Johnson testified he had conducted the review of that appraisal in connection with his official duties. At that deposition I informed Mr. Ricardo J.Hecht and William M. Brinton, counsel for the plaintiff, that the Agency would hold a noticed public hearing on December 1, 1975, to take final action upon the Hahn contract.

8. Exhibit F to this affidavit is a true copy of the Petition For Writ of Mandate And Injunctive Relief filed on September 27, 1974, on behalf of the City of Santa Rosa and the Urban Renewal Agency in Sonoma County Superior Court Action No. 78756. At the time of filing, the petitioners moved for a Preliminary Injunction and Peremptory Writ of Mandate to be heard on October 15, 1974. At the time of the hearing, the demurrer of the City of Rohnert Park was overruled and the City ordered to answer the petition. A true copy of the Answer is attached hereto as Exhibit G. The same order overruling the demurrer scheduled a

hearing on the merits for November 4, 1974. After the hearing on the merits the Court on December 9, 1974, issued its order denying the relief prayed for, and judgment was entered on December 24, 1974. A true copy of the Notice of Entry of Judgment is attached hereto as Exhibit H. The City of Santa Rosa and Urban Renewal Agency did not appeal the judgment, and it has been final and not subject to appeal since February, 1975.

9. The firm of which I am a member represented the City of Santa Rosa and/or the Agency in each of the suits listed on page 7 of the Brief submitted in support of this motion and each of the actions concluded as indicated therein.

10. The foregoing information is true of my own personal knowledge and if called as a witness I can competently testify thereto. This affidavit is submitted in support of the Motion for Summary Judgment and Motion to Dismiss of Defendants City of Santa Rosa and the Urban Renewal Agency of the City of Santa Rosa.

DATED: August 18, 1976

RICHARD E. BRANDT

STATE OF CALIFORNIA
COUNTY OF SACRAMENTO

On August 18, 1976, before me, a Notary Public, personally appeared RICHARD E. BRANDT, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

JOANNE G. SNIDER

McDONOUGH, HOLLAND, SCHWARTZ & ALLEN
A Professional Corporation
555 Capitol Mall, Suite 950
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Telephone: (916) 444-3900
Attorneys for Defendants

United States District Court
Northern District of California
Civil Action No. 74-2429 RHS

City of Rohnert Park, a municipal corporation,
Plaintiff,

v.

James T. Lynn, as Secretary of the United States Department of Housing and Urban Development; City of Santa Rosa, a municipal corporation, Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic, and Ernest W. Hahn, Inc., a California corporation,
Defendants.

AFFIDAVIT OF JOSEPH E. COOMES, JR. IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS

JOSEPH E. COOMES, JR., being duly sworn, deposes and says:

1. I am an attorney at law and admitted to practice before the courts of the State of California and the United States Federal District for the Northern District of California. I am one of the attorneys for defendants, City of Santa Rosa and Urban Renewal Agency of the City of Santa Rosa in this action.

2. On April 30, 1975, I attended the deposition of Peter M. Callinan, city manager of plaintiff City of Rohnert Park, and conducted the examination of the

witness. My questions and the answers of Mr. Callinan were taken down by Mr. Robert V. Maes, a Notary Public, who thereafter transcribed the same into typewriting. The partial transcript attached to this affidavit as Exhibit A (pp. 33-37 and pp. 39-40) accurately reflects my questions to Mr. Callinan and his answers concerning the land in Rohnert Park designated for regional shopping center use.

On May 21, 1975, I attended another session of the continued deposition of Mr. Peter Callinan and conducted the examination of the witness. My questions and Mr. Callinan's answers were again taken down by Mr. Robert V. Maes, Notary Public, who thereafter transcribed the same into typewritten form. Exhibit B to this affidavit is a partial transcript of that deposition (pp. 8-9) which accurately reflects my questions and Mr. Callinan's answers concerning attorneys' fees paid by Rohnert Park.

3. On July 2, 1975, I attended the deposition of Arthur F. Hollingsworth, Jr., former president of the Rohnert Park Chamber of Commerce, and personally conducted examination of the witness. My questions and the answers of Mr. Hollingsworth were taken down by Mr. Robert V. Maes, Notary Public, who thereafter transcribed the same into typewritten form. The partial transcript (pp. 31-33) attached to this affidavit as Exhibit C accurately reflects my questions and the answers of Mr. Hollingsworth concerning funds collected from Codding Enterprises and donated to the City of Rohnert Park for attorneys' fees.

4. As special counsel to the Urban Renewal Agency, I have been involved during the past two years in discussions and negotiations concerning the financing of the local public costs of the downtown Santa Rosa redevelopment project. The only feasible permanent source of funds to pay such costs are bonds issued by the Agency, the repayment of which is based on the increase of property taxes and revenues that will result from the development of the property. This method of financing is expressly authorized by the State Constitution and Community Redevelopment Law and is referred to as tax allocation financing.

5. Bond counsel and financial consultants for the Agency have advised me that the pendency of the instant lawsuits effectively prevents the Agency from issuing any bonds secured by the pledge of taxes from the proposed development of the Phase II and Phase III project areas, even though the Agency is not legally enjoined or restrained from issuing said bonds. The Agency's bond counsel, Orrick, Herrington, Rowley and Sutcliffe, have advised me that as long as the instant lawsuits are pending, they would not be able to issue an unqualified opinion that bonds of the Agency secured by the pledge of taxes from the proposed development of the Phase II and Phase III project areas would be valid and enforceable. The Agency's financial consultant, Blyth, Eastman, Dillon, Inc., has advised me that such Agency bonds would not be marketable and could not be sold without such an unqualified opinion of bond counsel.

6. The foregoing matters are true of my own personal knowledge, and, if called as a witness, I can competently testify they are true. This affidavit is submitted in support of the motion for summary judgment

and dismissal of defendants, City of Santa Rosa and the Urban Renewal Agency of the City of Santa Rosa.

DATED: August 18, 1976

JOSEPH E. COOMES, JR.

STATE OF CALIFORNIA
COUNTY OF SACRAMENTO

On August 18, 1976, before me, a Notary Public, personally appeared JOSEPH E. COOMES, JR., known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

JOANNE G. SNIDER

EXHIBIT A

MR. COOMES: Mr. Callinan, referring to Defendant's Exhibit B will you identify and refer to the property indicated as regional commercial and owned by Codding Enterprises?

MR. HECHT: I am going to object to the form of the question. What property Codding Enterprises owns, the best evidence is the Assessor's map rather than Mr. Callinan's testimony.

MR. COOMES: The question is preliminarily leading into some questions about the zoning applications and Mr. Callinan is aware of the property that was covered by that rezoning application.

Maybe I can rephrase the question.

MR. HECHT: If you would be so kind.

MR. COOMES: Mr. Callinan, at the time of the adoption of the General Plan in 1966, was the area that's designated "regional shopping center" zoned regional shopping center?

A No.

Q And at some time subsequent to that did the City of Rohnert Park consider and act upon the rezoning of the property in that area to regional shopping center zoning?

A Yes.

Q And was one of the applicants Codding Enterprises?

A Yes.

Q And are you familiar with the area owned by Codding Enterprises?

A Yes.

Q In reference to Defendant's Exhibit B, would you identify the property owned by Codding Enterprises that has been rezoned to regional commercial?

A It's the area generally to the immediate west of the freeway interchange shown on the map being the areas between South Santa Rosa Avenue or the frontage road and the freeway. And also the area to the southwest of the interchange being generally south of Rohnert Park Expressway.

MR. HECHT: Mr. Coomes, I am going to permit Mr. Callinan to testify and answer your questions as you ask them subject to stipulation that we will correct his testimony by checking with the Assessor's maps as to who owns what. I think that would be the best evidence.

MR COOMES: Very well.

Mr. Callinan, is there any other property in the City of Rohnert Park designated as regional commercial other than the property shown in the area adjacent to the freeway interchange and Rohnert Park Express-

way?

A No

Q Now, of this area shown on Exhibit B, is there a commercial development presently in place?

A Yes.

Q And could you describe the general location of that commercial development?

A On the east side of the freeway there was existing in the area north of the exressway, south of the creek, an Exchange Bank development, a Big 4 rental facility. South of the expressway on the east side there is a park plaza shopping center. There is also a Texaco Service Station on Commerce Boulevard. There is a self-service furniture facility and the Forsythe Clyde Real Estate Office and other offices in that building. On the west side of the freeway there is the Regional 8 Motel, I believe its name is. There is the Stevens Restaurant and across the street from that there is the Monastery Furniture Factory.

Off hand I think that's all of the commercial developments in the immediate area of the interchange between the two creeks shown on the General Plan map.

MR. HECHT: May we go off the record a moment?

MR. COMMES: Yes, off the record.

(Whereupon, counsel recessed the deposition briefly and conferred off the record.)

MR. COOMES: Mr. Callinan, for the convenience of counsel, would you mark the compass points on Exhibits A and B?

A Okay. North is as shown in the symbol and south of Exhibit B. East would be to the right looking at the map. West to the left and south towards the bottom of

the map. On Exhibit A the North symbol is shown on the left, the lower left hand corner of the map.North being toward the top of the map. South would best be toward the bottom of the map. East would be toward the right hand portion of the map and west toward the left hand portion.

MR. BRINTON: Just out of curiosity, Mr. Callinan, do you know if this is true or magnetic north?

A I have no idea.

MR. COOMES: Mr. Callinan, referring again to Exhibit B, does the City of Rohnert Park own property within the area shown as regional commercial?

A Yes.

Q And could you generally indicate the location of the City's property?

A In the area we have a two and a half acre corporation yard that is immediately adjacent to the rail road and the symbol which is — if I can find the symbol, the little symbols there with the triangle and small dot in the circle identified as corporation yard in addition in the solid red area we hold title to a library site, a proposed library site. We also own some right of way.

Q Would you indicate the proposed library site generally?

A Generally it would be on the north side of the road that extends eastward from Commerce Boulevard and it's in actuality is approximately 27,000 square feet and that's immediately south of the TGY store of the park plaza shopping center.

Q You mentioned street right of ways, does the City own any other property in that area?

A No, not inside the commercially designated area.

Q By commercially designated area you are referring to the area in solid red?

A That would be solid red for the checkered area.

Q Mr. Callinan, have you read the complaint filed by the City of Rohnert Park?

A Some time ago.

Q I'm not going to ask you specifically about the allegations in this complaint, but I do want to ask some questions to clarify some things in that complaint.

Does the City of Rohnert Park own any property in the City of Santa Rosa?

A No.

Q And therefore the City of Rohnert Park does not own any property in the project area of Santa Rosa Center Redevelopment Project?

A No.

Q Okay. You own no property?

A That's correct.

Q Does the City of Rohnert Park pay any taxes to the City of Santa Rosa?

A The City of Rohnert Park as a political subdivision you mean?

Q Yes.

A No, we are tax exempt.

Q Well, not necessarily if you own property outside your City.

Does the City of Rohnert Park pay any taxes to the United States Government?

A If you could define taxes, we pay for a example social security taxes through the State.

Q You pay employee taxes, do you pay excise taxes?

A No.

Q Franchise taxes?

A No.

Q Income taxes?

A Not yet, no.

Q Do you have — does the City of Rohnert Park have any financial obligations that would be increased by the development of a shopping center in downtown Santa Rosa?

A Increased?

Q Yes, financial obligations?

A The City doesn't but its residents do.

A No.

Q Does the City of Rohnert Park own any land which is zoned for commercial use in the City of Rohnert Park?

A Yes.

Q Zoned for commercial uses?

A Yes.

Q And what is that, some property you previously referred to in your testimony?

A Yes.

Q And what property was that?

A The 27,000 square feet of property that we recently proposed as the library site.

Q Is that property — has that property been removed from the tax roll as public property?

A I think we sent in a request to have it removed but I don't know that it has been removed.

Q Either has been or will be removed; is that correct?

A Yes.

Q Does the City of Rohnert Park own any land that is available for use for commercial enterprises?

A Yes.

Q What property is that?

A That's the land that we own north of Hinebaugh Creek on South Santa Rosa Avenue.

Q How did the City acquire that property?

A We purchased it from — I believe it was the Rohnert Park Industrial Development Company.

Q And is the property being held for public use?

A We bought it in anticipation of needing it for expansion of our waste water treatment facility.

Q And that property as shown on the Exhibit B, is designated for utility use; is that correct.

A That's correct.

Q Is the property presently being devoted to any private commercial use?

A No.

Q And is the property tax exempt?

A Yes.

Q By reason of its ownership by the City of Rohnert Park?

A Yes.

Q Is the property available for private commercial use?

A It could be.

Q Do you mean the City would consider leasing or selling that property?

A Subject to the City Council agreeing, yes.

Q Would that be compatible with the public use for which the property is being held?

A Yes, because since we have acquired it we have entered into an agreement with Santa Rosa for the treatment of our waste water. So this land will no longer be required for the purpose that we originally obtained it.

Q Is the City of Rohnert Park involved directly or indirectly in efforts to finance commercial development in the City?

A If you could define "indirectly?"

Q Is the City involved directly in efforts to finance commercial —

EXHIBIT B

to be in this article? I presume they mean the Council because they mentioned my name in the previous paragraph.

Q It is clearly referring to other City officials of the City of Rohnert Park. Are there other City officials other than members of the Council who would have knowledge of matters such as this?

A Oh, what the contributions from the Chamber?

Q Yes, yes?

A I certainly have knowledge. Finance Officer has knowledge our attorneys —

MR. HECHT: City officials.

THE WITNESS: Oh, that's right. City officials. I guess that would be it unless you count the Clerk in as a City official.

Q Do you have knowledge that some of the contributions made by the Chamber of Commerce of the City of Rohnert Park have come from developers with fi-

nancial interest in the project?

A I was misreading this thing. I have knowledge and our Financial Officer has knowledge that we received contributions from the Chamber of Commerce. I've heard and have been advised that the Chamber has received some contributions from developers but I have no direct knowledge of that.

Q From developers with property in the area zoned for regional shopping center?

A Yes. Developers whose interest appears to be mutual with the City of Rohnert Park.

Q You have stated that this suit so far has cost approximately $19,000 which in itself entirely has been paid by contributions collected by the Rohnert Park —

MR. HECHT: Excuse me, I don't recall, Mr. Coomes, that Mr. Callinan has stated that suit has cost $19,000 to date.

MR. COOMES: Okay. Mr. Callinan, referring to the paragraph first quoted to you, that the suit so far has cost approximately $19,000. Is that an accurate statement?

A Yes.

Q And is it further an accurate statement that the entire fee has been paid by contributions collected by the City's Chamber of Commerce?

A I believe that we have collected that much from the Chamber.

Q Given the fact that other persons have contributed to costs of this lawsuit does the City of Rohnert Park recognize an obligation to consult with these other parties?

MR. HECHT: I'm going to object to that question. It calls for an opinion and conclusion of the witness and it also calls for heresay evidence.

MR. COOMES: Mr. Callinan, did you consult with any other parties concerning the matter of dropping the lawsuit?

A No. May I talk to my Counsel?

MR. COOMES: Yes.

(Off the record discussion)

MR. COOMES: Back on the record. Well, did you discuss —

THE WITNESS: I discussed it with a lot of people.

Q After the May 5 Council Meeting?

A Yes.

EXHIBIT C

listed on this special events and under the so-called monthly financial report for the Rohnert Park Chamber of Commerce.

MR. ANDRIAN: Answer the question.

THE WITNESS: Answer it, I have forgotten what the question was?

MR. COOMES: The question is did the contribution from Codding Enterprises and Cofego in the amount of $5,000 in fact come into the Rohnert Park Chamber of Commerce?

THE WITNESS: Should I answer the question?

MR. ANDRIAN: Yes.

THE WITNESS: Yes.

MR. COOMES: Is that contribution referred to in the monthly financial report for April, May, 1975?

A Yes.

Q And would you indicate where that is referred to?

A Where?

Q Yes?

A Under Current Income, Item C, Special Events No. 1, 2 and 3.

Q Did any other contributions come in to the Rohnert Park Chamber of Commerce from Codding Enterprises for purposes of the lawsuit?

A This is off the record so I can clarify the question. Other than what you have indicated here?

Q Other than the $5,000 total just referred to, did any other contributions come in from Codding Enterprises?

A Yes.

Q And in what amount was that contribution?

A $14,000.

Q And is that referred to on the Monthly Financial Report?

A It is.

Q Exhibit 5?

A Yes.

Q Would you identify where that reference is, please?

A That is this part.

MR. HECHT: Go ahead.

THE WITNESS: I can't without seeing that.

Q I've got another copy.

A That's all right. It is under Current Income Special Events, line 3.

Q Referring again to Exhibit 5, the Monthly Financial Report. The $19,000 shown then is current income, represents 3 contributions from Codding Enterprises and Codding Enterprises on behalf of Cofego for purposes of this lawsuit, financing this lawsuit, is that correct?

A That's correct.

Q Do you know when this financial statement was prepared?

A I don't recall. As I say, it was sporadic.

Q Subsequent to its purported date, April, May, 1975, have any additional contributions been received by the Rohnert Park Chamber of Commerce from Codding Enterprises or Cofego Enterprises?

A No, none that I'm aware of.

Q Now I will ask you to refer to these other exhibits. Exhbits 8, 9 and 10. Exhibit 8, a Deposit Receipt in the amount of $14,000; Exhibit 9, a Deposit Receipt in the amount of $2,500. Exhibit 10, a Deposit Receipt in the amount of $2,500. Are those deposit receipts for the deposits by the Chamber of Commerce of Rohnert Park into its banking account of the contributions received from Codding Enterprises and Cofego which are referred to in this monthly financial report and in your testimony?

A To the best of my knowledge.

MR HECHT: Let me ask you a question, Mr. Hollingsworth. Did you attend to the depositing of that money?

THE WITNESS: Excuse me?

MR. HECHT: Did you go to the bank —

THE WITNESS: No, I didn't deposit the funds. I didn't make the deposits.

MR. COOMES: Who has general supervision over

the performance of clerical personnel in the office of the Chamber of Commerce, Mr. Hollingsworth?

A I do.

Q You did as President?

A That's correct.

Q Were these funds deposited into the general account of the Chamber of Commerce?

MR. HECHT: I'm going to object to that in addition to the grounds of relevancy, on the grounds of lack of foundation and calling for an opinion and conclusion of the witness.

MR. ANDRIAN: I join. There has been no foundation such showing that he went to the bank or that he deposited —

MR. COOMES: You supervised the — strike that question.

You know who deposited these funds on behalf of the Chamber of Commerce?

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In The United States District Court
For The Northern District of California
Civil Action No. 74-2429 RHS

City of Rohnert Park, a municipal corporation,
Plaintiff,

v.

James T. Lynn, etc., et al.,
Defendants.

AFFIDAVIT OF JULIAN A. FITZHUGH
IN SUPPORT OF FEDERAL DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO

JULIAN A. FITZHUGH, being duly sworn, deposes and says:

1. I am a Program Manager with the San Francisco Area Office, U.S. Department of Housing and Urban Development (hereinafter HUD), 1 Embarcadero Center, Suite 1700, San Francisco, California. I am presently and have been since September 1970 Program Manager for the jurisdiction of Program Area B which includes Santa Rosa, California.

2. As Program Manager, my duties include primary

responsibility for HUD's federally assisted programs in the City of Santa Rosa. The Santa Rosa Center Project, Phase II, is a federally-assisted Urban Renewal Project which received $16,847,609 in loan assistance and $12,527,017 in grant funds. The City has allocated $550,000 in Community Development block grant funds to Phase III.

3. The records of the San Francisco Area Office establish that the Santa Rosa Center Urban Renewal Plan was adopted by the Santa Rosa Redevelopment Agency on August 14, 1961 and adopted by the City Council of Santa Rosa on December 5, 1961 and approved by the Housing and Home Finance Agency (predecessor agency to the U.S. Department of HUD) on January 15, 1962.

The first amendment to the plan was approved by the Housing and Home Finance Agency on January 14, 1964 and the second amendment to the plan was approved by HUD on July 1, 1965.

The third amendment to the plan was adopted by the Santa Rosa Redevelopment Agency on March 3, 1970 and adopted by the City Council of Santa Rosa on March 10, 1970.

4. On May 25, 1970, HUD approved the third amendment to the Plan. The purpose of the amendment was to increase the project area by 31.2 acres. The addition was necessitated by an earthquake that resulted in structural damage causing blighted and deteriorated conditions in an additional downtown area. This condition warranted renewal treatment to protect the area already being renewed from being adversely affected by the spread of blight to the surrounding area and to aid downtown Santa Rosa in recovering from the damage done by the earthquake.

5. The Housing and Home Finance Agency (predecessor agency to U.S. Department of HUD) allocated $171,049 to the Santa Rosa Redevelopment Agency, a local public agency of the City of Santa Rosa duly organized and empowered under the California Community Redevelopment Law (California Health and Safety Code, Sections 33000 et seq.) to undertake planning activities in the downtown area of Santa Rosa. This allocation order was subsequently amended on March 6, 1962 to increase the amount by $19,849 for a total of $190,898 for the purpose of completing a final redevelopment plan and a loan and grant application.

6. On March 9, 1962 the Housing and Home Finance Agency (predecessor agency to the U.S. Department of Housing and Urban Development) received Part I Application for Loan and Grant from the Santa Rosa Redevelopment Agency to carry out urban renewal activities in the Santa Rosa Center Project Area under the provisions of Title I of the Housing Act of 1949, as amended. On June 6, 1962 a Loan and Grant Contract was entered into between the Santa Rosa Redevelopment Agency and the Housing and Home Finance Agency (predecessor agency to the U.S. Department of Housing and Urban Development) which authorized the start of project execution activities in 39.9 acres of downtown Santa Rosa. The Contract provided for a Federal Loan in the amount of $4,922,616 and a Federal Project Grant to $2,625,023. Said Contract has since been amended ten times on the following dates

and for the following purposes:

1st Amendatory Loan and Grant Contract — executed June 18, 1963, and increased the total grant to $2,694,263 and the total loan to $4,957,945.

2nd Amendatory Loan and Grant Contract — executed February 7, 1964, increased the total loan grant to $3,184,594 and the total loan to $5,450,497.

3rd Amendatory Loan and Grant Contract — executed October 18, 1963 decreased the total grant to $3,161,108 and increased the total loan amount to $5,778,721.

4th Amendatory Loan and Grant Contract — executed May 10, 1967, increased the toal Federal Grant to $3,333,329, and the loan to $5,908,880.

5th Amendatory Loan and Grant Contract — executed June 9, 1970, did not change loan or grant amount. The amendment changed the allowable interest rate under the contract terms.

6th Amendatory Loan and Grant Contract — executed September 14, 1970, increased total grant to $8,318,497 and increased the Project temporary loan to $13,223,939. The purpose of this amendment was to provide for redevelopment of an additional 31.2 acres.

7th Amendatory Loan and Grant Contract — executed September 20, 1972, increased the total grant by $1,553,370, for a total grant of $10,436,717, and increased the project temporary loan by $1,533,370 for a total loan of $14,757,309. The purpose of the amendment was to provide for

increased costs of project activities and did not provide for an increase in the project area.

8th Amendatory Loan and Grant Contract — executed November 27, 1973, increased the total grant by $1,800,000 for a total grant of $12,236,717 and increased the project temporary loan by $1,800,000 for a total loan of $16,557,309. The purpose of the amendment was to provide for increased costs of project activities and did not provide for an increase in the project area.

9th Amendatory Loan and Grant Contract — executed August 2, 1974 increased the total grant to $12,527,017 and increase the project temporary loan to $16,847,609.

10th Amendatory Loan and Grant Contract — did not change loan and grant amount but was an agreement by the Redevelopment Agency that it would take no action which would have an impact on historical structures in the Renewal Area without approval from HUD.

7. I stated in an affidavit of May 3, 1964 prepared for the suit of *Codding Enterprises* v. *Lynn*, Civil No. C-74-0802 SAW, U.S. District Court, Northern District of California, that the Department of HUD will not approve any further land disposition contracts for the Phase II area of the Santa Rosa project until an Environmental Impact Statement had been prepared in accordance with the National Environmental Policy Act.

8. On July 22, 1975, a final Environmental Impact Statement (EIS) was issued by the Department of HUD for the Santa Rosa Center Project. As set forth in

the distribution list attached to the final EIS, a copy of the final EIS was sent to Peter Callinan, City Manager, City of Rohnert Park, and to the law firm of Cotton, Seligmun and Ray, attorneys for Plaintiff in the subject lawsuit.

9. The Santa Rosa Redevelopment Agency requested a concurrence by HUD in the form of the Disposition Agreement with Earnest Hahn, Inc. on November 14, 1974 and in the disposition price on October 31, 1975 for the 21 acres in the Phase II area of the Santa Rosa Center Project. HUD is not a party to the Disposition Agreement or to any previous agreement between the developer Earnest Hahn, Inc. and the Redevelopment Agency. HUD reviews the form of the Disposition Agreement to insure that it contains required HUD provisions (e.g. the land contains an anti-discrimination covenant; the developer agrees not to resell the land; when title to the land passes, the proceeds will be immediately transferred to HUD into the Temporary Loan Repayment Fund). HUD concurs in the disposition price to insure the property was disposed of at its fair reuse value since proceeds from the land are to be used to retire outstanding federal loans.

10. By letter of November 7, 1975, HUD Director, Community Planning and Development Division, informed James K. Burns, Executive Director, Santa Rosa Community Development Commission that the Development Commission could proceed to dispose of the Phase II parcel at a minimum price of $2,000,000. Mr. Tedesco informed Mr. Burns that HUD had reviewed the provisions of the proposed disposition agreement for administrative and legal acceptability

and had no objection to its execution by the parties.

11. HUD was not requested to approve the disposition price for the Phase III area of the Santa Rosa Center Project since the $550,000 of Federal funds used were Community Development block grant funds and there is no requirement that land be disposed of at fair reuse value. Block Grant funds is grant not loan money; therefore, any proceeds from the land do not retire outstanding Federal loan obligations.

Date:

JULIAN A. FITZHUGH
Program Manager
San Francisco Area Office
Department of Housing and
Urban Development

Subscribed and sworn to before me this date: August 20, 1976

EUGENIA J. WILDFONG
Notary Public

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In The United States District Court
For The Northern District of California
Civil Action No. 74-2429 RHS

City of Rohnert Park, a municipal corporation,
Plaintiff,

v.

James T. Lynn, etc., et al.,
Defendants.

AFFIDAVIT OF LEEVERN JOHNSON
IN SUPPORT OF FEDERAL DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO

LEEVERN JOHNSON, being duly sworn, deposes and says:

1. I am a Realty Specialist with the San Francisco Area Office of the Department of Housing and Urban Development (hereinafter HUD). As Realty Specialist, my responsibilities include reviewing land acquisition and disposition appraisals in all HUD programs within the jurisdictional area of the San Francisco Area Office and determining whether the appraisals were done in accordance with HUD standards.

2. The San Francisco Area Office received land disposition appraisals for the Santa Rosa Center Project for 21 acres in Phase II of the project area which is to be used for a regional shopping center and was cleared with Federal Urban Renewal Loan and Grant Assistance. The following appraisals were received by HUD: Conger and Fisk dated January 10, 1972, Richard U. Ratliff dated November 15, 1972; Myers and Neithammer, dated April 3, 1970. A review of these appraisals was done by David L. Lane in June 1973, Real Estate Appraiser of Sacramento, California. In addition, Mr. Lane did an updated appraisal on October 1, 1975, which appraisal valued the subject property at $2.00 per square foot with a total value for the total 21 acres of $1,829,520.

3. I reviewed the October 1, 1975 appraisal of David Lane and the April 3, 1970 appraisal of Myers and Neithammer and found them to be in accordance with HUD requirements. Mr. Hugo Countanden, a former HUD Realty Specialist, had previously reviewed the Conger and Fisk, Ratliff, and Myers and Neithammer appraisals. Since proceeds from the sale of the land are to be used to retire outstanding Federal loans on the subject property, Title I of the Housing Act of 1949, Section 110(c)(4) provides that any property disposed of in the urban renewal area be at its fair value for uses in accordance with the urban renewal plan. Urban Renewal Handbook 7214.1; Chapter 3, page 9 states: "The fair reuse value shall reflect both the advantages created by the project and the requirements and limitations on land uses to be imposed on the redeveloper by the Urban Renewal Plan."

4. Based upon a review of the reuse appraisals and a

field review of the subject property, I recommended that the requested price of $2,000,000 for the Phase II land of approximately 21 acres be approved. In arriving at this recommendation, I field reviewed comparable sales listed in the appraisals, smaller shopping areas which could in competition with the proposed shopping center, and smaller parcel sales listed by the reuse appraiser.

Date: August 20, 1976

LEEVERN JOHNSON
Realty Specialist
San Francisco Area Office
Department of Housing and
Urban Development

Subscribed and sworn to before
me this date: August 20, 1976

PAUL DEMARE
Notary Public

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PLAINTIFF'S BRIEF IN OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT

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James T. Lynn, etc., et al.,
Defendants.

PLAINTIFF'S BRIEF IN OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT

I

STATEMENT OF THE CASE

The Plaintiff in this suit is the City of Rohnert Park, a California municipal corporation, located in Sonoma County. The purpose of the suit is to enjoin the continuance by defendants of a "current ongoing conspiracy" prohibited by the Sherman Act (15 U.S.C. 1, 2). This conspiracy threatens "loss or damage" to Plaintiff and to some of its inhabitants, property owners and taxpayers. Therefore, Plaintiff is "entitled to sue for and have injunctive relief" in this Court pursuant to Section 16 of the Clayton Act (15 U.S.C. 26), in harmony with the teaching of the Court of Appeals for this

Circuit in *State of Washington* v. *Automobile Manufacturers Association,* 538 F.2d 231, 235, 237 (9 Cir. 1976).

The objective of the conspiracy is to monopolize a substantial portion of the new general retail merchandise space needed to supply the existing and future demand therefor in the Santa Rosa Trade Area.[1]

To achieve this objective defendants have effectively forestalled the development and construction of commercial facilities including a regional shopping center on a site within Plaintiff's boundaries. These facilities as planned were capable of supplying the then existing demand for such space in the Trade Area.[2]

Defendants forestalled the construction of these commercial facilities by a threat to build a competing regional shopping center on a *unique* site with *unique* advantages in the downtown section of the City of Santa Rosa.[3] This center as conceived by defendants will contain at least seven hundred thousand (700,000) square feet of retail space, which is enough to supply the estimated demand for such space in the area *until 1990.*[4] The construction of this center and the acquisition of the site on which it will stand is to be financed primarily by a massive illegal *subsidy* from the federal government.[5]

---

[1] In the context of this case, the term "new general retail merchandise space" has the same meaning as the terms "new department store space" and "commercial space."

[2] It has been estimated that 400,000 square feet would be required to meet the demand by 1975 (Hahn Depo., Ex. 24, p. 14).

[3] Depo. Hahn, Ex. 24, pp. 2-5; Depo. Egan, pp. 50-51.

[4] Final Environmental Impact Statement, Santa Rosa Center (Calif. R-45) (F.E.I.S.), Daugherty Depo., Ex. 1, pp. 114-115.

[5] This subsidy was brought to the attention of the defendant Secretary of HUD on or about 10-29-73 (Depo. Sachs, Ex. 2, pp. 1-3).

What has been said makes it apparent under precedents established in cases involving similar circumstances that defendants have embarked on a conspiracy that is cognizable under the Sherman Act (*Hospital Building Co.* v. *Rex Hospital Trustees,* _____ U.S. _____, 48 L.Ed.2d 341, 342 (1976), a conspiracy to block the expansion and relocation of a hospital; *Juneau Square Corp.* v. *First Wisconsin National Bank,* 60 F.R.D. 46, 47-48 (D.C. Wis. 1973), a conspiracy to monopolize the commercial rental market of downtown Milwaukee; *Brachter* v. *Akron Board of Realtors,* 381 F.2d 723, 724 (6 Cir. 1967), a conspiracy to prevent negroes from owning or renting property in white neighborhoods in Akron; *Rogers* v. *Douglas Tobacco Board of Trade, Inc.,* 266 F.2d 636, 643-644 (5 Cir. 1959) cert. den. 361 U.S. 833, 4 L.Ed.2d 75, a conspiracy unduly to limit the use of tobacco warehouses; *Darnell* v. *Markwood,* 220 F.2d 374, 376 (D.C. Cir. 1954), a conspiracy to monopolize the suitable and desirable office space in the District of Columbia; *American Federation of Tobacco Growers* v. *Neal,* 183 F.2d 869, 871-872 (4 Cir. 1950), a conspiracy to exclude a tobacco warehouse from access to the tobacco market).[6]

Moreover, this conspiracy threatens "loss or damage" to Plaintiff, its taxpayers and particularly some of its property owners. To realize this we can begin by considering the *undisputed* proposition that the shopping center conceived and sponsored by defendants "should be able to absorb the needed growth for com-

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[6] These cases teach that *local* business restraints can produce effects proscribed by the Sherman Act.

mercial space in Santa Rosa *until about 1990*,"[7] and that *as* there is "not a large enough market to support two major shopping areas," the one built "on the less desirable site would suffer and perhaps fail."[8] It must therefore be conceded and concluded from a consideration of this proposition that it would be foolhardy to build within the foreseeable future commercial facilities inside Plaintiff's boundaries, and that those of its property owners who have invested to develop a site for such facilities will, unless the conspiracy is enjoined, most assuredly lose their investment. With respect to this, it should *not* be overlooked that this result will be achieved through an illegal subsidy and the deliberate creation of *excess* capacity.

The site designated for commercial facilities in which these property owners made their investment consists of approximately forty-five (45) assessor's parcels owned and assessed to seventeen (17) persons or entities.[9] Plaintiff also owns property in this site and this property is either available for commercial uses "or is zoned for commercial uses."[10]

Over a period of approximately twenty (20) years, in excess of a million dollars ($1,000,000) was spent under Plaintiff's direction for street construction, sewers, drainage, water mains and other improvements necessary to render the site suitable for commercial development. Most of the funds required to defray the cost of these improvements were raised by special as-

[7] All emphasis added to quoted material is ours, unless otherwise indicated.
[8] F.E.I.S., supra, pp. 114, 125.
[9] R.L. Brust Affidavit, Exhibit A.
[10] Callinan Depo., Vol. 1, pp. 39-40.

sessments levied on the several owners of the property, and this was done pursuant to the Improvement Bond Acts of 1911 and 1915.[11] Altogether these assessments aggregated the sum of approximately one million thirty thousand dollars ($1,030,000).[12]

All this clearly indicates that in developing this land Plaintiff has been acting as the representative or agent of almost a score of property owners and this leads to the conclusion that it has "*standing*" to sue on their behalf (64 C.J.S., Municipal Corporations, Sec. 2186, pp. 1030-1031). This conclusion also finds support in other circumstances present in this case.

The bonds issued to raise the money used for the improvements are by virtue of the provisions of the Improvement Acts of 1911 and 1915 payable exclusively from a *fund* created by the payment of the special assessments levied on the owners and their respective properties, and Plaintiff as well as any other issuer similarly situated is not liable for their payment (25 Cal.Jur.2d, Highways and Streets, Sec. 330, pp. 237-238). This is consistent with the generally accepted notion that when a city engages in the construction of improvements for the benefit of private property it is acting primarily in its *proprietary* capacity, and that money raised and disbursed for the purpose is not "public money," but constitutes "trust funds" held and spent by the city for the benefit of the individual owner [*City of Seattle* v. *Stirrat*, 55 Wash. 560, 104 Pac. 834, 836-837 (1909)]. We submit, therefore, that Plain-

[11] Callinan Depo., Vol. 1, pp. 40-43; Vol. ii, p. 39.
[12] R.L. Brust Affidavit, Exhibit A.

tiff in its capacity as *agent, representative* and *trustee* of its property owners, and as custodian and guardian of the collective rights of its inhabitants, has *standing* to bring this equitable suit to enjoin defendants' unlawful conduct thereby rendering unnecessary a *multiplicity* of such suits (*Muncie National Gas Co.* v. *City of Muncie,* 160 Ind. 97, 66 N.E. 436, 441 (1903); *City of Saint Mary's* v. *Hope Natural Gas Co.,* 71 W.Va. 76, 76 S.E. 841 (1913); *City of Lansoure* v. *Lasell,* 26 N.D. 638, 145 N.W. 577, 578 (1914); *City of Saginaw* v. *Consumers Power Co.* (Mich.) 182 N.W. 146, 154 (1921); 64 C.J.S., Municipal Corporations, Sec. 2190, p. 1032; 56 Am.Jur.2d, Municipal Corporations, Etc., Sec. 16, pp. 81-82; McQuillen, Municipal Corporations, Sec. 49.57, pp. 302-303).

Moreover, the interests of Plaintiff and its inhabitants coincide harmoniously with those of its property owners. Consideration of the nature and administration of the California retail sales tax [*City of San Joaquin* v. *State Board of Equalization* 9 C.A.3d 365, 370-371, 88 Cal.Reptr. 12 (1970)] makes it evident that a heavy concentration of retail merchandising business in Santa Rosa will enhance the retail sales tax revenues of that city, while diminishing those to which Plaintiff might otherwise be entitled, and as a consequence Plaintiff is threatened by the conduct of defendants with a loss of revenues which it could use either directly or indirectly for the benefit or relief of its inhabitants. Also Plaintiff is the proprietor of property within its commercial area which is likewise threatened with financial loss should defendants' scheme succeed. Accordingly, in this case, as in other

cases involving cities, and the antitrust statutes [*Chattanooga Foundry & Pipe Works* v. *City of Atlanta,* 203 U.S. 390, 395-396, 51 L.Ed. 240, 243-244 (1906)], it can be said that Plaintiff has standing to *sue* to vindicate such of its "*own proprietary interests*" as are "*congruent with the interests of*" its "*inhabitants*" [*State of California* v. *Automobile Manufacturers Association, Inc.,* 481 F.2d 122, 131 (9 Cir. 1973)].

Plaintiff, it may be argued, is here seeking relief which is *unrelated to competition,* but even if this be so, it does have *standing to sue* under Section 16 of the Clayton Act, because the relief it seeks "*serves the antitrust function of ending an ongoing violation*" of the Sherman Act (*State of Washington* v. *Automobile Manufacturers Association,* supra, 538 F.2d 231, 237).

The site on which defendants have threatened to build a regional shopping center in order to forestall the construction of competing commercial facilities inside Plaintiff's boundaries is the prime reponsibility of the defendant Secretary of the United States Department of Housing and Urban Development (hereinafter this defendant will be called either "HUD" or "Federal Defendant").

The land comprising the site is the responsibility of HUD because two-thirds (2/3) of it lie within an "*urban renewal area*" created by a lavish expenditure of millions of dollars obtained from the federal government through loan and grant contracts entered into by and between HUD and the defendant Urban Renewal Agency of Santa Rosa (hereinafter "defendant Agency")pursuant to the provisions of the Housing Act of 1949 (42 U.S.C. 1441, 1452(a) (c), 1453, 1454, 1455,

1456).[13]

"Urban renewal area" within the context of the Housing Act means an area which HUD approves "as appropriate for an urban renewal project." Among the activities which may be undertaken in such a project under the Act is the *sale* of "any property acquired in the urban renewal area . . . *at its fair value* for uses in accordance with the urban renewal plan" [49 U.S.C. 1460(a) (b) (c) (4)]. All of this indicates quite clearly that "HUD" must see to it that property thus acquired when resold must be disposed of "at its fair value."[14] Further, since the Housing Act declares that such property be sold "at its fair value," HUD in properly discharging the duties cast upon it by Congress is required to see to it that such sales do not "offer private persons opportunities for enrichment or exploitation" [*Foeller* v. *Housing Authority of Portland,* 198 Ore. 205, 256 P.2d 752, 767 (1953)]. It would appear also that HUD has *not* been authorized to *delegate* the task of determining "fair value." Hence, HUD has promulgated elaborate rules and regulations designed to ensure that there is strict compliance with this Congressional mandate.

These rules and regulations are found in the "Land Marketing and Redevelopment" section of HUD's Urban Renewal Handbook (7214.1 Rev. 8/74). This part of the Handbook is comprised of six (6) chapters which extend over forty-eight (48) pages. Much of what

[13] Fitzhugh Affidavit (8-20-76), p.3, line 11 to p.4, line 19.

[14] A compelling reason for this is that the proceeds of land sales are used to retire the loan made by HUD to local Agencies. (Fitzhugh Depo., p. 35; Fitzhugh Affidavit, p. 5, lines 18-21).

appears in it is in the form of categorical directives addressed to local public agencies with whom it has Loan and Grant contracts.

In the beginning of this section HUD explains that the statutory term "fair value for uses in accordance with the urban renewal plan" means "the fair *market* value of the property for its highest and best uses permitted under the Urban Renewal Plan" (p. 1).[15] Then in conformity with the statutory scheme HUD adds that "all urban renewal land shall be disposed of at a price not less than its fair reuse value" and that the "fair reuse value shall reflect both the advantages created by the project and the requirements and limitations on land use to be imposed on the redeveloper by the Urban Renewal Plan" (p. 14).[16] In connection with this, it should be observed that the Santa Rosa Urban Renewal Plan "permits the land to be used for *commercial facilities* such as those which will make up the proposed shopping center," including but not limited to "retail stores, personal and business service establishments, restaurants and other places serving food and drink, and public and private parking lots."[17]

The HUD Handbook also provides that redevelopment agencies obtain *prior* HUD *concurrence* or *approval* in connection with any land disposition agreement which allows a period of eighteen (18) months or more between its execution and the delivery of a deed

[15] These references are to the pages of the "Land Marketing and Redevelopment" section of the Handbook.

[16] These price restrictions do not apply to land sold for low or moderate income housing. There is *no* provision for housing in this project.

[17] Fitzhugh Depo., Ex. 2, p. 5; Exhibit D, p.5, attached to Plaintiff's complaint.

to the land by an agency (p. 19).

Now, despite the statute and regulations promulgated thereunder, defendant Agency with the *prior* concurrence of HUD[18] has entered into a contract with defendant Ernest W. Hahn, Inc., a corporate developer (hereinafter "defendant Developer") whereunder the land in "urban renewal area," acquired with federal money, comprising two-thirds (2/3) of the shopping center site, will be sold to the developer for far less than its "fair market value."[19]

To understand how this has come to pass we must first examine some of the details of the contract and the nature of the project being undertaken on this land by defendant Developer.

The land to be sold to defendant Developer by defendant Agency consists of two sections of downtown Santa Rosa property. These two sections are commonly known as "*Phase II*" and "Phase III."[20] *Phase II*, comprising approximately twenty-one (21) acres was acquired and cleared with federal money furnished by HUD and title thereto is presently in defendant Agency.[21] Phase III comprising approximately twelve (12) acres is presently in private ownership and defendant Agency intends to acquire, improve and clear it through the use of tax increments, and without federal assistance.[22]

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[18] Johnson Depo., Ex. 1.
[19] This is, in effect a subsidy.
[20] Affidavit of J. K. Burns, "Hahn Contract," Attachments C2 and C4.
[21] Johnson Depo., Ex. 1; Daugherty Depo., Ex. 1, p. 4.
[22] Judge Orrick indicates in *N.A.A.C.P., etc.* v. *Hills*, 412 F. Supp. 102, 108-109 (D.C. Calif. 1976) that Community Development funds (42 U.S.C. 5301 et seq.) will be used to buy the site of the Sears, Roebuck store in Phase III.

The thirty (30) acre site thus created by the contractual fusing of Phases II and III is to be developed by defendant Developer into "a downtown commercial shopping center as an *integral* part of a federally sponsored urban renewal project."[23] Moreover, the development of Phases II and III as a *unit* "is necessary to make the proposed center economically feasible."[24] Accordingly, properly to perform the contract defendant Agency must acquire, clear and improve the land in Phase III, and defendant Agency has reported to the City Council of Santa Rosa that this task will require an expenditure of seven million eight hundred seventy-two thousand two hundred five dollars ($7,872,205).[25]

As regards the purchase price of the *Property*, the contract provides that the Agency may at its option choose either "Alternative A" or "Alternative B." Under "Alternative A" "the Agency will sell the *Property* to the Redeveloper for, and Redeveloper will purchase the *Property* from the Agency and pay therefor, the total amount of three million dollars ($3,000,000) . . . to be paid in case (sic) or by certified check simultaneously with the delivery of the deed or deeds conveying the *Property* to the Redeveloper."[26]

Under "Alternative B" the Agency will sell the *Property in Phase II* to the Redeveloper, and the Redeveloper will purchase said Phase II property from

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[23] Affidavit of J. M. Gilchrist, supporting Hahn's Motion for Summary Judgment, pp. 1-2, 2-3.
[24] Daugherty Depo., pp. 19-21; Ex. 1, p.5.
[25] Burns Depo., Ex. 40, Report to City Council, pp. 25a-25b.
[26] Burns's Affidavit, "Hahn Contract," p. 6.

the Agency and pay therefor, the total amount of two million dollars ($2,000,000), . . . to be paid in cash or by certified check simultaneously with the delivery of the deed or deeds conveying *said part of the Property*. The Agency shall additionally, convey *the Property in Phase III* to the Redeveloper without cost.[27]

If defendant Agency chooses *Alternative A*, the financial results are as follows:[28]

Cost of Acquiring, Clearing and Improving Phase III	*Less: Purchase Price*	*Net Proceeds of Sale*
$7,872,205	$3,000,000	($4,872,205)

If the Agency chooses *Alternative B*, the financial results are as follows:

Cost of Acquiring, Clearing and Improving Phase III	*Less: Purchase Price*	*Net Proceeds of Sale*
$7,872,205	$2,000,000	($5,872,205)

The language used by the parties in the contract makes it clear that they were conscious that "*the Property*" to be bought and sold was a unit and necessarily indivisible. Also that the use of the word "integral" by defendant Developer shows that it considered Phases II and III "essential to the completeness"[29] of the shop-

[27] Burns's Affidavit, "Hahn Contract," p. 8.
[28] This without taking into account that under Alternative A, defendant Agency must "pay the sum of $2,000,000 for the construction of parking facilities." Burns's Affidavit, "Hahn Contract," p. 6.
[29] Webster's Seventh New Collegiate Dictionary (1969), p. 439.

ping center site.[30] In addition HUD recognized that two Phases had to be developed as one "to make the proposed center economically feasible." Logically, therefore, the net cost or deficit incurred under either Alternative must be spread or distributed over the thirty (30) acres comprising the shopping center site.

If this net cost or deficit is distributed over thirty (30) acres, the financial result is as follows:

1. Alternative A ($162,406) per acre
2. Alternative B ($195,740) per acre

On the other hand, *if* this net cost or deficit is distributed over twenty-one (21) acres in Phase II, the financial result is as follows:

1. Alternative A ($232,009) per acre
2. Alternative B ($279,628) per acre[31]

Taking into account that HUD's "appraiser" has "appraised" the total value of Phase II of 21 acres for a total value of $1,829,520, or $87,120 per acre,"[32] the conclusion appears inescapable that the appraiser erred egregiously, and that the land in the "urban renewal area" is being sold for something considerably less than its "fair market value."

However, the true dimensions of the largesse being exhibited here cannot be fully accredited until one becomes aware of the actual amount of money expended in acquiring, assembling, clearing and improving 21.2 acres in Phase II of the project. As to this, the record

[30] Sears, Roebuck & Co., now in Phase III is expected to move into the new site, Daugherty Depo., Ex. 1, pp. 121-123.
[31] These figures are not startling when one considers that defendant Developer has made a deal to sell 6.33 acres in the site for $3,000,000 or $473,934 per acre (Hahn Depo., Ex. 6, p. 1).
[32] Johnson Depo., Ex. 2, p.c.

discloses the following:

Real Estate Acquisition	$4,980,430[33]
Relocation Expense	164,000[34]
Property Management	5,000[34]
Site Clearance	510,000[34]
Site Improvements	1,770,858[34]
Interest Expenses	864,000[34]
Administrative Expense	472,476[34]
Total Cost	$8,766,984

The total of the federal money shown above distributed over 21.2 acres gives us a figure of $413,536 per acre.[35]

This, of course, now brings us face to face with the total cost of acquiring, clearing and improving Phases II and III, and this total cost is as follows:

Phase II	$ 8,766,984
Phase III	7,872,205
	$16,659,189

Affidavits filed in support of HUD's motion for summary judgment disclose that HUD's concurrence in the disposition price of two million dollars ($2,000,000) for the Phase II land is based on a recommendation made by Mr. Johnson, a "Realty Specialist," employed by HUD.[36] Mr. Johnson's recommendation is in turn based on his review of two appraisals submitted to HUD, and a field review of the property.[37] Mr. Johnson has had *no* practical experience in real estate appraisal,[38] and hence is not an expert in that field. Accordingly, it is apparent that his recommendation cannot lend rational support to HUD's approval of the disposition price.[39]

[33] Answer of defendants City of Santa Rosa and Urban Renewal Agency, p. 7, lines 8-13; answer of defendant Developer, p. 9, lines 11-16.
[34] Burns's Depo., Ex. 40, pp. 25a-25b (Budget Analysis, Phase II, HUD Eligible Expense Items).
[35] Again, these figures are not startling when one considers that defendant Developer will sell 6.33 acres for $473,934 per acre. Note 31, supra.

HUD's "Realty Specialist" did *not* in making his recommendation take into account the *cost* of acquiring and clearing the land in either Phase II or Phase III,[40] although such cost is frequently considered by our Courts the *best* "evidence of fair market value (*Golstein* v. *C.I.R.*, 298 F.2d 562, 567 (7 Cir. 1962); *Tripp* v. *C.I.R.*, 337 F.2d 432, 434 (9 Cir. 1964); *United States* v. *Certain Land In Borough of Brooklyn, etc.*, 346 F.2d 690, 693-694 (2 Cir. 1965). Moreover, he appears to have been unimpressed by the fact that one of the two appraisals he reviewed declared that the site created by the fusion of the Phases was *unique* and possessed a "monopoly position."[41]

In the communication approving the disposition price of the Phase II property, HUD took pains to disclaim responsibility for the probable consequences that could flow from the prodigal disposition of the acreage in Phase III, and in this connection HUD said:

[36] Fitzhugh Affidavit, p. 5, lines 7-21; Johnson Affidavit, p. 1, lines 21-22.
[37] Johnson Affidavit, p. 2, lines 8-10; p. 2, line 22 to p. 3, line 1.
[38] Johnson Depo., 9-11-75, p. 7; Johnson Depo., 11-11-75, pp. 44-46.
[39] Mr. Johnson's recommendation is "hearsay in disguise," and therefore inadmissible (*United States* v. *Williams*, 447 F.2d 1285, 1290-1291 (5 Cir. 1971).
[40] Johnson Depo., 11-11-75, pp. 47-48.
[41] Johnson Depo., supra, pp. 48-50.

> "We have not reviewed either the disposition agreement or request for concurrence with respect to Phase III, since it is a state redevelopment over which HUD has not jurisdiction or authority." (Johnson Depo., 11-11-75, Ex. 1.)

This hand washing cannot avail HUD as it is responsible for the massive infusion of federal money which made the merger of the two Phases possible. We submit, therefore, that the following taken from the opinion in *Garrett* v. *City of Hamtramck*, 335 F.Supp. 16, 25 (D.C. Mich. 1971), is most applicable here:

> "Any discussion on Hamtranck's duties and responsibilities *cannot* be segregated from a realization that the federal government's involvement in the various Hamtramck programs *included* the approval and funding necessary to carry out those programs. Urban renewal is accomplished through federal means, and the federal government *must take responsibility for the direction which the program takes*. . . . and to proceed with such activities by *claiming innocence* of what has been or is being done with federal funds *cannot be tolerated*. If what has occurred in Hamtramck is ever to be stopped, *responsibility must be placed at the source*, that is, the Department of Housing and Urban Development which funds and administers the programs . . . ."

Moreover, Phase III is *essential* to the fulfillment of the hopes and aspirations that HUD entertains for "downtown Santa Rosa as a *regional* center for *retailing*, commerce and government." The following excerpts from HUD's E.I.S., will suffice to establish this fact:

> *"The only way to capture the project growth in the Santa Rosa regional retail market for downtown Santa Rosa and to insure that it is a regional center for retailing as well as business and government is to build a regional shopping center of the sort proposed by the Santa Rosa Renewal Agency.* Thus a smaller commercial development would not meet HUD's goal of creating a viable central city and preventing urban sprawl.
>
> A smaller shopping center would not of itself cause greater adverse environmental impacts than the proposed regional shopping center. It could actually improve the transition between the renewal project and existing commercial areas, if the proposed center is not redesigned. And it would reduce the impact of relocation and two historic buildings would not need to be moved.
>
> Such an alternative, however, would prevent Santa Rosa from gaining the benefits of improved downtown circulation, police and fire protection, earthquake safety, air quality and other minor project benefits such as increased landscaping and rodent extermination.
>
> *Much more serious would be the blighted condition of the Phase III area which would be worsened by removal of the Sears store to the new shopping area.* The alternative would cause the blight to adversely affect the viability of the City's renewal projects and perhaps the whole central business district.
>
> And, most serious of all, a smaller shopping center would fail to meet *HUD's basic goal of revitalizing downtown Santa Rosa as a regional center for retailing, commerce and government, and preventing unnecessary suburban development* when downtown land exists which can be recycled. As long as the possibility exists that downtown Santa Rosa can enhance its regional prominence in commercial

> and government activities by a compact, regional shopping center on blighted downtown land, such a project will be preferable to a smaller project which gives only short-term benefits and which may not be able to maintain its economic viability beyond that short time."[42]

What HUD has said in the E.I.S., shows that while it always had the power, it now has the *specific* intent to create a monopoly in the retail trade in downtown Santa Rosa. Moreover, what HUD has done in connection with what it has said, establishes that it has gone far beyond the mere administration of the Housing Act, and has become a "joint venturer," "partner" and "participant" with the other defendants in this scheme to restrain and monopolize commerce, and there are no *good faith* arguments that can justify its conduct [*Burton* v. *Wilmington Parking Aurthority,* 365 U.S. 715, 725-726, 6 L.Ed. 45, 52 (1961); *Holonak* v. *Avco Corp., etc.,* 514 F.2d 285, 288-289 (2 Cir. 1975); *Gatreaux* v. *Romney,* 448 F.2d 731, 739 (7 Cir. 1971)].

We should also note at this point that HUD's goals and activities are not circumscribed either by the boundaries of the urban renewal area or of the City of Santa Rosa. These transcend these boundaries because HUD conceives that its mission includes giving direction to the economic growth of Sonoma County and the prevention of urban and suburban growth or sprawl.[43] Thus the following is written in HUD's E.I.S.:

"But the most important problem caused by

[42] Daugherty Depo., Ex. 1, pp. 122-123.
[43] Fitzhugh Depo., 9-3-75, pp. 65-66.

> building a mixed use project that includes scaled down commercial uses would still be *the failure of Santa Rosa to capture the future retail growth of Sonoma County.* Such a project would fail to meet HUD's basic goal of revitalizing downtown Santa Rosa as a regional center for retailing, commerce and government and *preventing unnecessary suburban development when downtown land exists which can be recycled."*[44]

This establishes that HUD's aims and activities can and will vitally affect persons and entities whose businesses and properties are located outside the Santa Rosa Urban Renewal Area.[45]

The record indicates that there may be a basic conflict between what HUD is attempting to accomplish here, and what it must do in the proper administration of the Housing Act.

HUD avows that property over whose disposition it has authority must be sold at a price which represents fair market value for *uses in accordance with the redevelopment plan,*[46] and that this price *must be paid in cash*. Further, HUD avers that it does *not delegate* to defendant Agency or any other Agency the task of determining fair value.[47]

In any event, the views proclaimed by HUD are quite different from those entertained by defendant Agency and defendant Developer. The two defendants

[44] Daugherty Depo., Ex. 1, p. 130.
[45] Compare this situation with the one presented in *Gibson & Perrin Co.* v. *City of Cincinnati,* 480 F.2d 936 (6 Cir. 1973).
[46] "Fair market value" therefore must be determined on the basis of *all* uses permitted under the plan and *not* on the basis of a *specific use* such as a regional shopping center (*County of Santa Clara* v. *Curtner,* 245 C.A.2d 730, 743, 54 Cal.Reptr. 257 (1966).
[47] Fitzhugh Depo., 9-3-75, pp. 41-43.

assert that the developer of a regional shopping center should *not* be required to pay more for land than he can "afford to pay," or more than he can "reasonably be expected to pay." Thus the following appears in a memorandum from the Executive Secretary of the defendant Agency to its members:

> ". . . Other cities have encouraged the development of major regional shopping centers by providing and paying for public improvements, utilities and facilities, such as curbs, gutters, sanitary sewers, streets, street lights, water, storm drains, etc., *which usually would be paid for by the developer*. In others, the *cost of land has been reduced through redevelopment to a price a developer can afford to pay*. In any event, a developer *can only afford to pay* for land, buildings, parking and supporting off-site and on-site improvements and facilities *in an amount which can indicate the probability of a reasonable profit.*
>
> Thus, when cities assist such developments they are not subsidizing the developer so that the developer is paying less than he can reasonably afford to pay, but merely providing the economic and financial basis whereby *the developer pays what he reasonably can be expected to pay.*"[48]

The foregoing clearly establishes that defendant Developer will not pay fair market value for uses in accordance with the redevelopment plan.

Early on (11-15-72) an appraiser employed by defendant Agency forecast that the development of the downtown site "*under the limitation to regional shopping center use*" would develop only "*nominal land*

[48] Burns's Affidavit, Summary of Hahn Proposal.

value" of some three million dollars ($3,000,000) of which 73.3% would be attributable to Phase II.[49]

This appraiser also went on to inform defendant Agency that the planned regional shopping center in downtown Santa Rosa "*would kill off any possibility of a major development in Rohnert Park for a long time to come.*"[50]

Later, on June 12, 1973, another appraiser also employed by defendant Agency confirmed the forecast made by the first appraiser when he wrote that "the developer can pay *no more than a nominal sum for the land.*"[51]

All of this is likewise corroborated by other evidence in the record.

The testimony of the President and Chief Executive Officer of defendant Developer[52] is, in effect, that in arriving at the purchase price of the Santa Rosa shopping center site or any other similar downtown site this is determined "*by working backwards from the income that can be derived from the costs that can be paid for on the land for the costs of development.*" His testimony is also to the effect that land is about a seven percent element in the cost of the total project." Additionally, his testimony is that defendant Developer has no interest in and does not take into account "*the fair market value* (of the land) for any other uses under the redevelopment plan."[53] Finally, this testimony, in substance, indicates that defendant Devel-

[49] Burns's Depo., Ex. 30, Ratcliff's letter of 11-15-72 to Burns, pp. 1-2.
[50] Burns's Depo., Ex. 30, Ratcliff's appraisal, p. 24.
[51] Burns's Depo., Ex. 29, p. 3.
[52] Hahn Depo., p. 4.
[53] Hahn Depo., pp. 73-74.

oper is not "buying land," but is instead *creating land* in the form of elevated structures which should be considered some form of consideration to be received by the seller in addition to cash.[54] As to this, it should be borne in mind that HUD requires that the disposal price of such land be paid in cash, and not in some other form.

The foregoing shows that the defendants are not thinking of selling or buying in terms of "fair market value," but in terms of what the defendant Developer thinks he can be reasonably expected to pay for property. This makes evident the fact that HUD's goal of making Santa Rosa the economic capitol of Sonoma County is not compatible with its statutory duty of obtaining fair market value in cash for the acreage in Phase II.

The record goes on to disclose that defendant Agency and defendant City of Santa Rosa (hereinafter collectively "Santa Rosa defendants") have engaged in *anticompetitive* activities intended to forestall the development of the commercial area within Plaintiff's boundaries. This conduct obviously does not enjoy immunity as valid governmental action under the Sherman Act.

On September 27, 1974, the Santa Rosa defendants filed a Petition For Writ Of Mandate and Injunctive Relief in the Superior Court for the County of Sonoma against Plaintiff and against Hugh Codding, Codding

[54] Hahn Depo. pp. 75-76.

Enterprises, a corporation, Paul Golis and Cofego Enterprises, a limited partnership, *real parties in interest*.[55] The real parties in interest own property within Plaintiff's commercial area, and the purpose of the Petition For Writ was to enjoin Plaintiff from granting applications for the rezoning of the property involved thus effectively blocking its commercial development.[56] On December 24, 1974, the Superior Court ruled against the Santa Rosa defendants and in favor of Plaintiff and the real parties in interest denying the relief sought by the Santa Rosa defendants. This judgment became final in February, 1975.[57]

The *verified* answer of real parties in interest, Paul Golis and Cofego Enterprises, a limited partnership, reads in pertinent part as follows:

> "Said petition herein and the individuals directing them are engaged in the use of the courts to achieve their goals and they, and each of them know that:
>
> 1. Cofego is not trying to build a regional shopping center, but trying to provide the legitimate downtown center for the City of Rohnert Park.
>
> 2. That this property is originally part of the City of Rohnert Park and has been a part of the master plan for this purpose for the last twenty years/ (sic)
>
> 3. That the proceedings that Golis and Cofego have followed during the past year has been to develop this through a sub-division and the development of these properties and he has been unable to do so.

[55] Brandt Affidavit, p. 4, par. 8, and Ex. F attached.
[56] Brandt Affidavit, Ex. F, p. 17, line 12 to p. 18, line 25.
[57] Brandt Affidavit, p. 4, line 14; Ex. H attached.

> The intervention of the Agency and the City has already delayed the development of Cofego for several months. The actions of these individuals is arbitrary, compricious (sic) and malicious and they are trying to hold up the development of these premises and are using the courts herein to put illegal pressure on the battle between Codding and the City, over all of which Cofego and Golis have no interest or control."[58]

The deposition of Mr. Blackman, City Manager of Santa Rosa tends to support the substance of the above-quoted allegations. It discloses that the Santa Rosa defendants had learned and were concerned over the fact that Hugh Codding was attempting to persuade Sears, Roebuck & Company to move from downtown Santa Rosa to Plaintiff's commercial area. It also discloses that those defendants became concerned over the possibility of the development of two (2) regional centers just seven (7) miles south of Santa Rosa and its economic impact on that city. Finally, it discloses that because of all of these concerns the City Council authorized the filing of a suit.[59] It may be inferred from all this, as does the answering real party in interest, that regardless of the ostensible purpose of the suit, its real purpose was effectively to block the development of Plaintiff's commercial area.

Such anticompetitive conduct on the part of cities and other local bodies is not "automatically beyond the reach of the federal antitrust laws." Accordingly, in order to escape liability the Santa Rosa defendants

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[58] Brandt Affidavit; Ex. G attached, p. 2, line 28 to p. 3, line 15.

[59] Blackman Depo., p. 5; pp. 9-12; 12-14; pp. 16-17; p. 19.

must establish by competent evidence that all that they did here falls within the intended scope of the powers granted them by the California legislature, but they have presented no such evidence (*City of Lafayette, La.* v. *Louisiana Power & Light Co.,* 532 F.2d 431, 436 (5 Cir. 1976).

The record very clearly establishes that defendants have deliberately embarked on an anticompetitive course of conduct to cause "injury in fact" to Plaintiff and its property owners. Accordingly, their interests are, not arguably, *but very definitely within the zone of interests* to be regulated and protected by the several statutes which have been here so flagrantly violated [*Data Processing Service* v. *Camp,* 397 U.S. 150, 25 L.Ed. 184 (1970); *Barlow* v. *Collins,* 397 U.S. 159, 25 L. Ed. 192 (1970)].

II

ARGUMENTS

1. At pages 6-7 of its brief, HUD raises the question whether Plaintiff, who only has a financial or economic interest in the matter has standing to sue under NEPA.

The answer must be affirmative.

Injuries of a non-economic nature, widely shared aesthetic and environmental interests, *as well as economic injuries,* can amount to an "injury in fact" sufficient for standing under the Administrative Procedure Act [*Cady* v. *Morton,* 527 F.2d 786, 791 (9 Cir. 1975)].

2. At pages 6-7 of its brief, HUD raises the issue whether Plaintiff has standing to challenge a redevel-

opment plan.

This issue is irrelevant because Plaintiff has not challenged the Santa Rosa Urban Renewal Plan.

3. At pages 9-11 of its brief, HUD raises the issue whether interstate commerce is involved.

The answer must be affirmative.

The deposition of defendant Developer's President discloses that interstate commerce in building materials is involved in the construction of shopping centers, and that once such a center is in operation a very substantial amount of out-of-state merchandise will be sold therein (Hahn Depo., pp. 9-12; Ex. 1 attached).

Additionally, we have filed the affidavit of Dr. Claude Gruen showing that interstate commerce is definitely involved in the operation of regional shopping centers.

4. At pages 12-13 of its brief, HUD raises the issue whether HUD may be sued for violations of the antitrust laws.

The answer must be affirmative [*Contract Buyers League* v. *F & F Investment,* 300 F.Supp. 210, 216 (D.C. Ill. 1969); *Baker* v. *F & F Investment,* 480 F.2d 829, 831-833 (7 Cir. 1973)].

5. At pages 13-15, HUD raises the question whether it acted arbitrarily in concurring in the minimum disposition price of Phase II.

The answer must be affirmative.

The record clearly discloses that HUD in allegedly exercising its discretion relied on the opinion of a non-expert. Moreover, this opinion is inadmissible hearsay (Please see pages 13-14 of this Brief).

6. At page 3 of its Memorandum, defendant Developer contends that functions performed by private parties under the direction of a public agency are "exempt from application of the antitrust laws."

This is an invalid contention unless it be clearly shown that the public agency (HUD) involved has been accorded a specific exemption from the antitrust laws by Congress, and no such showing has been made here [*Hecht* v. *Pro-Football, Inc.,* 444 F.2d 931, 945-947 (D.C. Cir. 1971)].

7. At pages 4-6 of its Memorandum, defendant Developer contends that Plaintiff lacks standing to assert antitrust claims.

This is an invalid contention and we have shown it to be so at pp. 1-6 of this Brief where we rely specially on the doctrines announced in *State of Washington* v. *Automobile Manufacturers Association,* supra, 538 F.2d 231, and *State of California* v. *Automobile Manufacturers Association, Inc.,* supra, 481 F.2d 122.

8. At pages 6-7 of its Memorandum, defendant Developer contends that Plaintiff cannot maintain an action as "*parens patriae*."

This contention is irrelevant because Plaintiff is not attempting to maintain an action as "*parens patriae*."

9. At pages 9-12 of their brief, the Santa Rosa defendants argue that the Court lacks subject matter jurisdiction for claims under the Sherman Act.

This argument has been dealt with for the most part at page 22, supra, of this Brief.

10. At pages 12-18 and pages 21-27 of their brief, the Santa Rosa defendants argue in substance that the Court is barred from entertaining any claim against the Santa Rosa defendants based on State Law.

This argument is irrelevant because Plaintiff makes no claims based on State Law. In making this argument these defendants have overlooked that the record establishes that HUD does not delegate to any State Agency "the task of determining fair value" (Please see our Brief, p. 17, supra).

11. At pages 18-21 of their brief, the Santa Rosa defendants make an argument that misconceives Plaintiff's *present* position regarding the E.I.S. which eventually was prepared and published on July 22, 1975. Plaintiff complains of the E.I.S. because HUD is using it to justify the sale of the property in Phase II at less than its fair market value, and this complaint is fully justified under the doctrine of *Cady* v. *Morton,* supra, 527 F.2d 786, 791.

12. At pages 28-33 of their brief, the Santa Rosa defendants argue that Plaintiff lacks standing to sue. This argument is fully dealt with at pages 1-6 of this Brief.

13. At pages 33-35, the Santa Rosa defendants argue that valid governmental action cannot give rise to liability under Sherman. This argument, of course, begs the question because it has not been established that the action taken by the governmental defendants is in fact valid. Defendants are reminded that not every governmental act points the path to an antitrust shelter [*Alabama Power Co.* v. *Alabama Electric Cooperative,* 394 F.2d 672 (5 Cir. 1968)].

The motions for summary judgment and to dismiss should be denied.

Dated: October 19, 1976.

Respectfully submitted,

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United States District Court
Northern District of California
Civil Action No. 74-2429 WWS

City of Rohnert Park, a municipal corporation,
Plaintiff,

v.

James T. Lynn, etc., et al.,
Defendants.

CERTIFICATE OF SERVICE
BY MAIL

I, the undersigned, RICARDO J. HECHT, one of the attorneys for the Plaintiff in the above-entitled action, hereby certify that I have served copies of the foregoing "Plaintiff's Brief In Opposition To Motion For Summary Judgment," "Affidavit of Dr. Claude Gruen," "Affidavit of Roland L. Brust," and "Affidavit of R. Dean Stahr" on the attorneys for the defendants by depositing copies thereof in the United States mail, postage prepaid, in envelopes addressed to said attorneys at their respective addresses which addresses are the last addresses of said attorneys known to me.

Dated: October 19, 1976.

By: RICARDO J. HECHT

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United States District Court
Northern District of California
Civil Action No. 74-2429 WWS

City of Rohnert Park, a municipal corporation,
Plaintiff,

v.

James T. Lynn, as Secretary of the United States Department of Housing and Urban Development; City of Santa Rosa, a municipal corporation; Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic; and Ernest W. Hahn, Inc., a California corporation,
Defendants.

REPLY OF DEFENDANTS CITY OF SANTA ROSA AND URBAN RENEWAL AGENCY OF THE CITY OF SANTA ROSA TO PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I

INTRODUCTION

This memorandum is submitted by the City of Santa Rosa and the Urban Renewal Agency of the City of Santa Rosa (the "Santa Rosa defendants") in reply to the brief and affidavits of plaintiff City of Rohnert Park in opposition to the defendants' motions for

summary judgment. This reply deals first with plaintiff's responses to the arguments of the Santa Rosa defendants' motion for summary judgment, which are set forth at page 24 of the plaintiff's brief, and then addresses the contentions made in the section of plaintiff's brief entitled "Statement of the Case."

II
ARGUMENT

A. LACK OF SUBJECT MATTER JURISDICTION OVER ALLEGED SHERMAN ACT VIOLATIONS.

Plaintiff argues that *Sapp* v. *Jacobs*, 408 F. Supp. 119 (S.D. Ill. 1976) and the other cases cited by the Santa Rosa defendants to demonstrate the absence of subject matter jurisdiction for any Sherman Act claim do not show such a lack of subject matter jurisdiction under the circumstances here presented because building materials for the proposed Santa Rosa Regional Shopping Center will be purchased in interstate commerce and because Mr. Hahn and Mr. Claude Gruen, plaintiff's economist, believe that if the Santa Rosa Shopping Center is built, Sears, Roebuck & Co., R.H. Macy Co., and similar stores in the Santa Rosa Center are likely to purchase goods in interstate commerce for resale at their stores. As has been explained in the Santa Rosa defendants' brief, *Sapp* v. *Jacobs* expressly discredits this "building materials" theory. Moreover, the major fallacy of plaintiff's argument is that all of the interstate activities plaintiff refers to involve the proposed Santa Rosa Center. Plaintiff's complaint is that commerce will be burdened and restrained with respect to the potential regional shopping center site

in Rohnert Park. No facts have been submitted showing an impact on interstate commerce with respect to the proposed development of a shopping center or retail sales activity at the City of Rohnert Park shopping center site.

B. THE BAR OF PLAINTIFF'S CLAIMS BY THE PREVIOUS *IN REM* PROCEEDING IN THE SONOMA COUNTY SUPERIOR COURT.

Plaintiff argues that its action is not barred by the previous Sonoma County Court *in rem* proceeding "because plaintiff makes no claims based on State Law." The error of plaintiff's argument is that the previous Superior Court action involved the litigation of matters of federal law, specifically, the allegation that the sale to Hahn violates the standard for adequacy of consideration set forth in 42 U.S. Code, Section 1460 (c)(4), and Section 1472.1 of the Urban Renewal Handbook of the Department of Housing and Urban Development and the claim that the proposed Santa Rosa development will constitute a monopoly and an unlawful combination or conspiracy in restraint of trade (see First Amended Complaint, Action No. 79762, Exhibit A, Affidavit of Richard E. Brandt). These issues were litigated as the first cause of action and the sixth cause of action of the State Court suit. They have been resolved conclusively against plaintiff by the Intended Decision and the Court's intended conclusions of law which are attached, respectively, to the first and second affidavits of Richard E. Brandt in support of the motion for summary judgment.

C. ENVIRONMENTAL IMPACT STATEMENT.

Plaintiff contends that based on *Cady* v. *Morton*, 527 F.2d 786, 791, it is entitled to maintain a claim relating to the Environmental Impact Statement ("EIS"). The particular passage in the case referred to by plaintiff states that an injury which is both economic and environmental in nature can amount to an "injury in fact" sufficient to give a party standing to assert a claim for an alleged violation of the National Environmental Policy Act ("NEPA"). Plaintiff's evidence in opposition to summary judgment describes only economic consequences from proposed redevelopment activities. Two essential elements for a cause of action based on *Cady* that plaintiff lacks are: (1) an alleged violation of NEPA, and (2) an alleged environmental consequence injurious to the plaintiff. Since an EIS has been prepared, and plaintiff apparently does not claim the EIS is defective, there is no genuine issue as to any material fact involving a claim founded on NEPA. Plaintiff has not even attempted to respond to the arguments of the Santa Rosa defendants that the remaining federal involvement in the redevelopment of downtown Santa Rosa is not sufficient to justify any relief against them, even if the federal defendants have failed to comply with NEPA.

D. PLAINTIFF LACKS STANDING TO SUE.

Plaintiff claims it has standing to sue because "Plaintiff has been acting as the representative or agent of almost a score of property owners and this leads to the conclusion that it has '*standing*' to sue on their behalf (citation omitted)." The affidavit submitted by Ronald Burst, City of Rohnert Park Engineer, shows that the property owner with by far the greatest interest in the proposed shopping center is Codding Enterprises. Plaintiff also claims it has standing because it owns part of the property at the Rohnert Park site, property which is held as a proposed library site. (Deposition of Callinan, Vol. I, pp. 35-39.) The City of Rohnert Park, of course, has presented no evidence by affidavit or otherwise that demonstrates it intends to develop commercial facilities, itself, or go into the business of retail trade.

The arguments and affidavits submitted by plaintiff make precisely the point that the Santa Rosa defendants argued in their own brief in support of their motion for summary judgment: plaintiff's interest in shopping center development at the Rohnert Park site is the indirect economic consequences upon the businesses that might develop facilities there. As is explained in *Gibson & Perin Co.* v. *City of Cincinnati*, 480 F.2d 936 (1973); *Harrison-Halsted Community Group, Inc.* v. *Housing and Home Finance Agency*, 310 F.2d 99 (7th Cir. 1962); and *Pittsburgh Hotels Assn.* v. *Urban Redevelopment Authority of Pittsburgh*, a party complaining of such an indirect economic consequence of a redevelopment project has no standing to sue for an alleged violation of the Federal Housing Act of 1949 or an alleged failure to comply with the federal laws and regulations dealing with the adequacy of a land disposition prices. Similarly, as a representative of its inhabitants not itself engaged in real estate development or retail trade, plaintiff cannot sue for alleged violations of antitrust laws affecting its inhabitants

who may be engaged in such activities (see *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 31 L.Ed.2d 184, 92 S.Ct. 85 (1972). To sue for an alleged violation of NEPA, the plaintiff must allege a violation of that law and resulting injury. With the completion of the EIS, there is no alleged violation in this case.

E. ANTITRUST IMMUNITY AND LACK OF EVIDENCE OF ANTITRUST VIOLATION

Plaintiff argues that the Santa Rosa defendants' claim of govenmental immunity from the antitrust laws under the circumstances alleged in the complaint

> "begs the question because it has not been established that the action taken by the governmental defendants is in fact valid."

On the face of the record presented through the affidavits in support and in opposition to these motions for summary judgement, the acts of the government defendants complained of, including those of the Santa Rosa defendants, are governmental actions within their jurisdiction to act. For this motion, as for a trial, it is the burden of plaintiff to show some facts that support the allegation that antitrust violations are masquerading as government action. Even accepting the plaintiff's "characterization" of the facts, its antitrust claims reduce the simple charge that the government subsidy to redevelopment violates the Sherman Act. This "theory" is discredited by *Gibson & Perrin Co.* v. *City of Cincinnati, supra*. Plaintiff has cited no authority for the novel proposition that a government subsidy constitutes a restraint of trade or that the incidental economic consequences flowing from such a

subsidy can be an illegal monopoly.

III

PLAINTIFF'S "STATEMENT OF THE CASE"

Plaintiff's "Statement of the Case" sets forth the facts most favorable to the plaintiff and characterizes them to support its argument. For the most part, the facts can be separated from the arguments and characterizations by reference to the affidavits and exhibits to affidavits submitted in support and in opposition to the motions for summary judgment. However, on two matters, the plaintiff's version of the is materially misleading; these are the description of the terms of the Hahn contract and the account of the interests of the federal defendant and Santa Rosa defendants in opposing the development of a shopping center in Rohnert Park.

A. THE HAHN CONTRACT.

Plaintiff's discussion of the Hahn contract and the law relating to the adequacy of land disposition prices hopelessly confuses the distinctions between the function of the Court and the function of the public agencies, the initial cash payments of Hahn and the total contract consideration, and the public costs of slim clearance and the fair value of land that has been cleared for redevelopment.

If the adequacy of the disposition price to Hahn is challenged by a party with standing to sue, the rcle of the Court is not to determine the value of the property, but rather to determine whether the Department or

the Urban Renewal Agency abused its discretion in determining that the price to be paid by Hahn satisfied the standard of the federal law and regulation or the State law. Although the plaintiff filed its lawsuit in November of 1974, it chose not to submit any evidence on the value of the urban renewal project property to the federal administrator, prior to the November 1975 federal concurrence in the contract and land price, or to the Agency, prior to its approval of the contract in December of 1975. The question for the Court, if any, is whether the evidence before the federal defendant and Agency, *viz.*, the appraisal of David E. Lane and the other appraisals which conclude that Hahn is paying fair value, is so false and fraudulent that it cannot be deemed to support the federal concurrence in the contract or the Agency approval of the contract. The only evidence submitted by plaintiff to meet this burden is the appraisal review of Mr. R. Dean Stahr.

Precisely the same issue was presented to the Honorable J. Hilary Cook in the consolidated State cases entitled *Codding Enterprises, et al.* v. *Urban Renewal Agency of the City of Santa Rosa, et al.* The testimony of Mr. Stahr at that trial, a partial transcription of which is attached to the second affidavit of Richard E. Brandt, was identical in all material respects to the statements of his affidavit submitted in opposition to this motion. The question posed to Judge Cook was whether, in view of Mr. Stahr's testimony, the finding of the Agency in approving the Hahn contract that the price established by the contract was "fair and equitable for the land according to its value for reuse and . . . not less than the fair value of the land for uses in

accordance with the redevelopment plan . . ." was supported by substantial evidence contained in the record of the Agency's action. Under California law, if Mr. Stahr's testimony raised a question as to the integrity of the evidence before the Agency as to the value of the property Judge Cook would have been required to apply his independent judgment to determine whether there had or had not been a violation of the law relating to the adequacy of the disposition price. See, *In re Redevelopment Plan for Bunker Hill*, 61 C.2d 21, 38, 37 Cal.Rptr. 74, 389 P.2d 538 (1964). As is shown by the Notice of Intended Decision attached to the first Affidavit of Richard E. Brandt, and the conclusion of law attached to his second affidavit, Judge Cook determined that the Agency's finding with respect to the adequacy of the price was supported by substantial evidence and was not placed in question by Mr. Stahr's testimony.

When examined in detail, Mr. Stahr's testimony is clearly [sic] inconsistent with the evidence on value before the government defendants. The Lane appraisal concedes that the project area site could be sold at a higher price per square foot if sold in parcels as Mr. Stahr suggests, but Lane also concludes, based on the non-speculation requirement of the redevelopment plan and the past history of sales in the project, that sale in parcels would take approximately ten years. The Lane appraisal shows that the present value of sales at higher prices over the course of ten years is less than the cash price that Hahn will pay now. Mr. Stahr does not address the question of the time necessary for disposition as parcels or the effect of non-

speculation restrictions.

Plaintiff also creates confusion by its many references to Phase III. Phase III is not assisted by the federal government under the Housing Act of 1949. It is not subject to any federal regulations concerning the price paid for land sold in such a federally-assisted urban renewal project. The analysis of Phase III costs and prices contained in pages 11 and 12 of plaintiff's brief is irrelevant to any issues relating to the Housing Act of 1949. More important, plaintiff's analysis ignores the total consideration of Hahn for the site in the urban renewal project. The $2 million and $3 million cash prices referred to by plaintiff are but a fraction of the total consideration. Under the alternatives of the contract, Hahn will either pay all costs of constructing public parking facilities or all costs in excess of $2 million. The appraisal of Mr. Lane (at page 60) estimates the cost of these facilities will exceed $7.5 million. In other words, Hahn must pay between $5 million and $7.5 million for parking, in addition to the cash price. Also, Hahn may be required to pay a fee in lieu of parking assessments of $401,000 per year or more. The many elements of Hahn's consideration are explained in the contract summary attached to the affidavit of Mr. Burns.

The gist of plaintiff's antitrust theory is that Hahn will receive a competitive advantage by acquiring the downtown Santa Rosa site at a bargain. The evidence in the administrative record demonstrates just the opposite. Hahn will pay $6 million more for the opportunity to develop in downtown Santa Rosa than it would for a comparable opportunity to develop in a suburban

site, such as that in Rohnert Park. (Affidavit of Burns, Transcript 10/29/74, page 12.) Mr. Hahn has testified that the terms of the contract for the downtown Santa Rosa site are not more favorable to his company than the terms of any of its many contracts for disposition and development. (Deposition of Hahn, pp. 36-42.) Other contracts for disposition of land in downtown areas subject to HUD's concurrence are among the many disposition contracts Mr. Hahn identified as being more favorable to his company than the contract for disposition of the land in Santa Rosa. On the other hand, the Rohnert Park site has received an $842,000.00 subsidy from the state and federal governments for the construction of a freeway interchange. (Deposition of Callinan, Vol. I, pp. 60-68.)

Finally, the reference in plaintiff's brief to the cost of acquiring and clearing the property Phase II and Phase III is irrelevant. Hahn is not receiving all of Phase II and plaintiff has failed to show the cost of the property being conveyed to him in that part of the project. Furthermore, what plaintiff is attempting to argue is that Hahn must bear the public cost of slum clearance. Plaintiff is, in effect, saying that slum clearance is not a proper governmental function. This question, of course, has long since been decided against plaintiff by *Berman* v. *Parker*, 38 U.S. 26, 96 L.Ed. 27, 75 S.Ct. 98 (1954), and the many other state and federal decisions holding that redevelopment is a legitimat function of government.

B. THE DEFENDANTS' INTERESTS IN ROHNERT PARK DEVELOPMENT.

Plaintiff's brief, at pages 15-18, quotes at length from the EIS and various other documents to show that the Department of HUD and the Santa Rosa defendants have a specific purpose and intent of locating retail development in downtown Santa Rosa and preventing such development at the site in the City of Rohnert Park. The inference of plaintiff's brief is that this is a scheme between the federal government and the Santa Rosa defendants to serve their own purposes. The fact is that locating retail development in Santa Rosa rather than Rohnert Park is a goal of the regional plan of the Association of Bay Area Governments. Exhibit V to the deposition of Peter Callinan, plaintiff's City Manager, is a letter from the Association of Bay Area Governments in response to an environmental impact report prepared for the proposed development at the Rohnert Park site. The letter, attached hereto as Exhibit A, points out that the proposed Rohnert Park shopping center development, by placing a regional shopping center outside existing urban centers on undeveloped land, promotes suburban sprawl and violates the 1970-1990 Regional Plan. The genuine concerns of the Santa Rosa defendants for environmental impacts from the proposed development of a regional center in Rohnert Park are further explained in the pleadings of the lawsuit by the City of Santa Rosa against the City of Rohnert Park, which are attached to the first affidavit of Richard E. Brandt in support of this motion.

IV

CONCLUSION

The Santa Rosa defendants submit that plaintiff's response to their motion for summary judgment has failed to identify or raise any genuine issue of material fact, that they are entitled to judgment as a matter of law, and that their motion for summary judgment should be granted.

Dated: October 22, 1976

Respectfully submitted,

McDONOUGH, HOLLAND,
SCHWARTZ & ALLEN
A Professional Corporation
By RICHARD E. BRANDT

Attorneys for Defendants City of Santa Rosa and Urban Renewal Agency of the City of Santa Rosa

EXHIBIT A

June 17, 1974

Mr. Paul Skanchy, Planning Director
City of Rohnert Park
6750 Commerce Boulevard
Rohnert Park, California 94928

Dear Mr. Skanchy:

Thank you for providing us with an opportunity to review the Draft Environmental Impact Report (DEIR) for the proposed Cofego/Codding Regional Commercial and Residential Development. We apologize for not providing our comments in sufficient time for the June 13 hearing. Considering the significance of the project, however, the review period allowed has not been adequate. The State Guidelines suggest that in order to provide sufficient time for public review, review periods for draft EIR's "should not be less than 30 days nor longer than 90 days except in unusual situations." (Public Resources Code, Section 15160)

The enclosed comments, based on a staff analysis, are directed toward the adequacy of the information provided with particular emphasis on regionally significant impacts. The outcome of this review, therefore, cannot be construed as an indication of the Association's support or non-support of the project.

The proposed project includes a regional commercial facility which is, by its very nature, regionally significant. Nevertheless, despite the State Resources Agency's requirement that the regional setting be considered with specific reference to related projects (Public

Resources Code, Section 15142), the DEIR makes no reference whatsoever to the policies of the ABAG *Regional Plan 1970:1990*. Because the proposal is privately financed it is not subject to review by ABAG in its capacity as the Federally-designated clearinghouse for the nine-county Bay Area. ABAG's Executive Committee has, however, indicated the agency's interest in reviewing and making recommendations on developments of this type because of their inherent regional significance. Moreover, due to the magnitude of the proposed project's impact, it will without question generate applications for Federal assistance which will require ABAG review pursuant to Office of Management and Budget Circular A-95 (e.g., the Rohnert Park interceptor). For this reason it is imperative that the relationship this proposal bears to adopted regional objectives and policies be understood at the outset.

As a multi-jurisdictional regional planning agency, ABAG has formulated and adopted regional policies which are to be used as guidelines for determining whether local actions will enable achievement of regional objectives. Foremost among these policies is the concept of the City-Centered Region which emphasizes the revitalization of existing urban areas and the clustering of smaller communities into centers of sufficient size to provide a full range of facilities and services. For the purposes of the Regional Plan, all towns or combinations of towns over 50,000 population are designated as community centers. At this scale it is possible to plan for and promote living, working and shopping within the same community thereby reducing re-

liance on the automobile and enabling preservation of the region's natural resources. The plan makes a clear commitment to the strengthening of existing community centers meeting these criteria. In view of these policies, it appears that a facility designed to draw patrons from other cities (i.e. Santa Rosa, Petaluma and, perhaps, more distant parts of Sonoma and northern Marin Counties) would generate impacts incompatible with these regional objectives. On the other hand, commercial developments designed and scaled to accommodate the market demands of Rohnert Park/Cotati residents would appear consistent with regional goals.

The balance of our comments are directed toward more specific aspects of the DEIR as follows:

1. *Alternatives* – State Guidelines require that the discussion of alternatives include not only alternative uses of the site, but also alternatives to the project's location, "which could feasibly attain the basic objectives of the project." It is unclear from the report exactly what the project's objectives are — commercial facilities to meet the needs of Rohnert Park/Cotati residents or a regional shopping center to accommodate a market including Santa Rosa, Petaluma and northern Marin County. If the intent is to command a substantial secondary market (which appears to be the case given the classification of *regional* commercial), alternatives must include redevelopment of the Santa Rosa and Petaluma Central Business Districts and alternate sites for regional shopping centers, such as the Hanna Ranch proposal in

Novato. The discussion of the project's impacts must then also include adequate consideration of the economic impact on existing and proposed commercial development in cities which would be included in the market area. Given the report's population projections for the area (37,000 permanent residents by 1990), a significantly scaled-down single shopping center or several smaller neighborhood commercial areas would appear adequate to meet strictly local needs. By way of comparison, the primary market area for the proposed Hilltop Shopping Center in Richmond, a facility with *half* the gross leasable area of the Rohnert Park project, has a projected 1990 population of 247,600.

2. *Traffic Impacts* – although the project is referred to as a *regional* commercial center and the report indicates that up to 114,000 vehicle trips per day could be generated at saturation, the discussion of traffic impact is limited to local streets. The average daily traffic volume on U.S. Route 101 in the vicinity of Rohnert Park is now about 42,500. What is the design capacity of this route? What percentage of the trips generated by the regional commercial areas would utilize 101? What other projects in the vicinity may also effect an increase in 101 usage? What capacity improvements will be required and by what year?
3. *Air Quality* – The report's conclusion that the increased vehicular emissions resulting from the proposal "are not considered to be of a significant value to cause major adverse impacts" is not sub-

stantiated. Based on information included in the section on Trip Generation, the total project is estimated to have a maximum generation potential of close to 114,000 trips per day (V.3), although the section on Air Quality inexplicably uses the figure of 50,000 trips (IV.12). The Bay Area Air Pollution Control District's proposed criteria for defining indirect sources of air pollution consider a non-residential facility capable of generating 5,000 or more vehicle trips in any eight hour period to be of sufficient magnitude to be considered a potential significant source of pollutants. The Federal Environmental Protection Agency's proposed criteria for less urbanized areas include new parking facilities with a capacity of 2,000 or more vehicles. While the DEIR fails to indicate the number of parking spaces which would be provided, using the standard ratio of 5 spaces per 1000 square feet of gross leasable area and the potential yield of the project at full development (2.5 million square feet), the figure *12,500* can be derived.

The bulk of the air quality information included in the DEIR relates to the Bay Area as a whole and provides virtually no basis for analysis of the project's incremental impact in the primary area. Pollutant emissions for the Santa Rosa Air Basin, rather than the entire district, would be far more meaningful and useful for this purpose. Moreover, the limited relevant information is contradictory. The fact that Rohnert Park and Santa Rosa are in the same valley — one which

has already been identified as having a potentially serious air quality problem — is far more significant than the similarity between "urban conditions" in Petaluma and Rohnert Park. According to the report, the weekly oxidant level in Santa Rosa from October 1972 to September 1973 averaged between .07 and .08 ppm during the months of October, December and March. It seems that this is more important than the fact that the standard (.09 ppm/hour) was actually exceeded only 8 days during 1973. A project that will, by conservative estimates, double emmissions in an area already subjected to high oxidant levels because of seasonal inversions cannot be considered to be of negligible impact.

Finally, the conclusion that the only realistic mitigation of air pollution can occur at the manufacturing level is completely contrary to the findings of those public agencies involved in air quality regulation. The realization that land use planning practices which encourage continued reliance on the automobile have a sigificant effect on air quality was precisely the rationale behind establishing indirect source review procedures. Conversely, actions that reduce automobile usage, such as the development of commercial facilities in areas served by pubic transit, the reduction of parking spaces in suburban facilities or the introduction of local transit in conjunction with the development of projects such as the one under consideration here, can all serve to reduce pollutant emissions.

4. *Flood Problems* – Rohnert Park has been identified by the Department of Housing and Urban Development as a community which has special flood hazards. Is Rohnert Park eligible for inclusion under the National Flood Insurance Program? If so, what land use and control measures have been adopted in compliance with the program's regulations? In order to qualify for inclusion, local governments in flood-prone areas must adopt building permit systems and impose zoning and building codes which assure that new structures will withstand minimum flooding conditions. The DEIR, however, notes only that the engineering and construction methods to be utilized in project construction are anticipated to be those "normally associated with low-rise commercial construction found in the Bay Area." (III.6) Under the provisions of the Flood Disaster Protection Act of 1973 (Public Law 93-234), all Federal aid and Federally-related assistance will be denied in flood-prone communities which fail to qualify for participation in the Flood Insurance Program by July 1, 1975. This sanction includes mortgage loans from banks under the Federal Deposit Insurance Corporation and assistance to cover restorative work after a flood disaster occurs.
5. *Economic Impact* – The report estimated revenues based on the project's assessed valuation at full development. The assessment of public costs is limited to consideration of municipal operating costs and disregards the other public expenses

which would be required to support a 275-acre commercial development and the prerequisite local population of 50-60,000. It is noted, for example, that the existing water and wastewater treatment systems are inadequate to meet the proposed project's demands. Improvements to state and interstate highway routes may also be required to provide additional capacity in response to the project's effects. The cost of these projects — financed by Federal and State aid, tax revenues and user fees as well as by direct outlays by municipal and county government to provide the local share of public facilities construction — must be considered as well as the provision of public services once the project has been completed.

We hope this information will be of use in your own review of the project. Please contact us if further information or clarification is required. We would also appreciate receiving a copy of the Final EIR, including other agencies' comments on the DEIR, when it is available.

Sincerely yours,

Rudolph R. Platzek
Director of Planning and Programming

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the County of Sacramento; I am over the age of eighteen years and not a party to the within above entitled action; my business address is 555 Capitol Mall, Suite

950, Sacramento, California 95814. On October 22, 1976, I served the within REPLY OF DEFENDANTS CITY OF SANTA ROSA AND URBAN RENEWAL AGENCY OF THE CITY OF SANTA ROSA TO PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT and SECOND AFFIDAVIT OF RICHARD E. BRANDT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS CITY OF SANTA ROSA AND URBAN RENEWAL AGENCY OF THE CITY OF SANTA ROSA on the parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box at Sacramento addressed as follows:

Mr. William M. Brinton, Esq.
Mr. Ricardo J. Hecht, Esq.
Cotton, Seligman & Ray
Alcoa Building, Suite 1400
One Maritime Plaza
San Francisco, California 94111

Mr. James L. Browning, Jr.
United States Attorney
Mr. Paul E. Locke
Assistant United States Attorney
P.O. Box 36055
450 Golden Gate Avenue
San Francisco, California 94102

Mr. William N. Willens
Barrett, Stearns, Collins, Gleason & Kinney
1150 Union Bank Tower
Del Amo Financial Center
Torrence, California 90503

I, Mary M. Miller, declare under penalty of perjury that the foregoing is true and correct.

Executed on October 22, 1976, at Sacramento, California.

Mary M. Miller

RICHARD E. BRANDT, ESQ.
MCDONOUGH, HOLLAND, SCHWARTZ & ALLEN
A Professional Corporation
555 Capitol Mall, Suite 950
Sacramento, California 95814
Telephone: (916) 444-3900
Attorneys for Defendants City of
Santa Rosa and Urban Renewal Agency
of the City of Santa Rosa

United States District Court
Northern District of California
Civil Action No. 74-2429 WWS

City of Rohnert Park, a municipal corporation,
Plaintiff,

v.

James T. Lynn, as Secretary of the United States Department of Housing and Urban Development; City of Santa Rosa, a Municipal corporation; Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic; and Ernest W. Hahn, Inc., a California corporation,

Defendants.

SECOND AFFIDAVIT OF RICHARD E. BRANDT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS CITY OF SANTA ROSA AND URBAN RENEWAL AGENCY OF THE CITY OF SANTA ROSA

STATE OF CALIFORNIA
COUNTY OF SACRAMENTO

Richard E. Brandt, being first duly sworn, deposes and says:

1. In the course of my duties as one of the attorneys for the defendants City of Santa Rosa and Urban Renewal Agency of the City of Santa Rosa, I have represented said defendants in the consolidated cases entitled *Codding Enterprises, et al., plaintiffs,* v. *Urban Renewal Agency of the City of Santa Rosa, et al., defendants*, Sonoma County Superior Court, Nos. 79465/79762/84237/81799, referred to on page 3 of the Affidavit of Mr. R. Dean Stahr submitted in opposition to the motion for summary judgment.

2. Mr Stahr appeared and testified as a witness in *Codding Enterprises, et al.* v. *Urban Renewal Agency of the City of Santa Rosa, et al.* His testimony was taken down in shorthand by Mr. Jack Riffle, Certified Shorthand Reporter, and thereafter transcribed in typewritten form by Mr. Riffle. Exhibit A to this affidavit is a partial transcript of the testimony of Mr. Stahr. Exhibit B is a page of the same transcript reflecting that I, as one of the attorneys for the defendants, withdrew my motion to strike Mr. Stahr's testimony at the close of his testimony. To the best of my recollection, the partial transcripts attached as Exhibit A and Exhibit B accurately reflect the testimony given by Mr. Stahr at the trial, and the questions and comments of counsel and the Court at that time.

3. Mr. Stahr was the only appraiser who testified at the trial in *Codding Enterprises, et al.* v. *Urban Renewal Agency of the City of Santa Rosa, et al.* The only other appraisal evidence of the value of property in the Santa Rosa Center Urban Renewal Project presented at the trial in the *Codding Enterprises* action was the evidence contained in the Administrative Record lodged with the Court of the Urban Renewal Agency action on the contract for disposition and sale of land to Ernest W. Hahn, Inc. That record, which includes,

among other matters, the appraisal of David E. Lane, MAI, is the same record which is attached to the Affidavit of James K.Burns in support of this motion for summary judgment.

4. Subsequent to Judge Cook's announcement of his Intended Decision in the *Codding Enterprises, et al.* v. *Urban Renewal Agency of the City of Santa Rosa, et al.*, which is attached to my first affidavit in support of this motion, the defendants in that action requested findings of fact and conclusions of law, and filed objections to the proposed findings of fact and conclusions of law submitted by me at the direction of Judge Cook. On October 13 and October 14, 1976, a hearing was held in Markleeville, California, at which proposed findings of fact and conclusions of law prepared by me, and the objections and proposed counterfindings of fact and conclusions of law of the defendants were argued by counsel and Judge Cook decided which findings and conclusions to adopt or modify as his own. At the close of that hearing, Judge Cook instructed me to prepare findings of fact and conclusions of law in accordance with his decisions. The findings of fact and conclusions of law which Judge Cook instructed me to prepare and submit for his signature include those attached hereto as Exhibit C.

5. The foregoing facts are true of my own personal knowlege and, if called as a witness, I can competently testify to them. This affidavit is submitted in support of the motion for summary judgment of the defendants City of Santa Rosa and the Urban Renewal Agency of the City of Santa Rosa.

I declare under penalty of perjury that the foregoing

is true and correct.

Executed on October 21, 1976, at Sacramento, California.

RICHARD E. BRANDT

Subscribed and sworn to before me
this 21st day of October, 1976.

JOANNE G. SNIDER
Notary Public

EXHIBIT A

burden is going to be upon you to make the motion.

MR. BRANDT: Yes, Your Honor.

THE COURT: All right. Proceed, counsel.

Q Mr. Stahr, have you made a market study of the property in the Urban Renewal Area of downtown Santa Rosa?

A Yes.

Q And what is a market study?

A Well, basically what was done was all the sales in the area, both agency and independent, back through 1969, I believe, were investigated and plotted. Out of that I came out with 40 sales of property that were either bare, bare land or nearly bare land and plotted it on a chart, and I did the same thing with the Urban Renewal sales, and the results was an estimate of the fair market value for the property within the project.

Q And you have prepared a map or a chart of the area; is that correct, Mr. Stahr?

A Yes.

Q Is this that map?

A Yes.

Q Mr. Stahr, could you explain to the court the details on that map?

A Yes. To keep the map from becoming too cluttered, the numbers are quite small. Also to make it fit two boards, north is slightly different than on the map that Your Honor has been looking at. The freeway is to the left. The freeway is to the left. The area of the district is outlined in red. Phase II is up to Fifth Street; Phase III above. There is the Sears store. The main

street, two-way, is Fourth Street. The plaza has a big X through it. The sales that were plotted, the numbered sales or independent sales are here and they covered commercially-zoned properties in a wide area. The lettered configurations are within the Urban Renewal District No. I and they represent sales prices starting with the location of the city hall which is, oh, for about $1.88 or seventy cents, sixty-four cents in 1965. The sales price in the Urban Renewal Area — let me, before we get into that do this. The area of sales that are outside of the Urban Renewal District No. I varied from a low of about $1.75 or $1.70, which is in the peripheral areas. Here's two thirty-four off on E Street. Here's $2.05, and in '72 and on Fifth Street. The sales in this area, particularly during the appraisal of the parking lots were four to six dollars, and in various appraisals that have been done in the area, the values went from four dollars to the $6.50 generally.

The most important sales, after getting into it, became the sales of the Urban Renewal District No. I, because they were first bare land, but secondly, they were sold with the restrictions that are on the subject property, and these sales prices starting in 1961 were as low as one dollar a square foot for a 27,240 square-foot site to Santa Rosa — Burbank. The highest one was for $9.80 or $10 in the area of Fourth for the — no, in the area of the Square, which is C-1 for the Federal Eureka Building. The last sales, the ones that took place in '73-74 varied from a low of three dollars for the Chamber of Commerce building for an acre to $10 a square foot for a hundred — excuse me — the Chamber of Commerce building was 14,572 square feet, to a

high of $10 to the Northern California Savings & Loan.

Now, these high sales have always been pretty much the same.

Now, starting back in, when Urban Renewal was first brought in, the highest sales were at the Courthouse Square. At that time there was a courthouse in the middle and the street came around and they took the courthouse out and at that time I had $10 a square foot for land acquired on Fourth, on the north side of the Courthouse Square. An adjacent and independent sale No. 16 was to the Exchange Bank on Fifth Street in 1970, which was slightly over $10 a square foot. The sales now in the Urban Renewal District that were sold to the, they call it the Hoffman contract, but it's really, Wells Fargo is going to occupy an area larger here, and we are talking basically of $10 a square foot for their purchase. Some is a little over, some is a little under.

The sales of the property stopped at D Street. There is some independent sales that took place when this was an old industrial area, warehouses and so forth, and to the north there is a hospital in the corner. There is Sears, a Ford agency. Fifth is where it stopped.

Those values in that area during the parking lot acquisition and for the acquisition by the agency were, well, this one adjacent where A Street is between Fourth and Fifth was five dollars to five and a half. Among four appraisers, no one disagreed as to land value.

Now, in the condition that I am appraising this property, Fifth is one-way towards the freeway; Third

is one-way away from the freeway and Fourth Street is both directions, and that's going to be without any regard to any type of development, except commercial is going to be the better properties. The area closest to the freeway would be ideal for some sort of a department store or a bank. It would probably be equal to the bank sale if it were on the ordinary market. Ten dollars per square foot for a prime location with good access and visibility and plenty of parking is not an unusual figure in a town the size of Santa Rosa or my home over in Napa.

The low points are going to probably be for the residential construction off to where I am pointing on Sonoma Avenue.

There was a tower development that was done by private individuals for — I don't want to say for elderly, but a tower development of apartments in which the basis of valuation on the land was $2500 per unit. That was quite lower. There were no garage requirements, because the elderly people want to be in close where they can walk around and see. That was done, let's say, five years ago or longer. That $2500 per unit would probably lie in this area. Now, 500 square feet per unit seems a little small on land area, and it would indicate as high as five dollars, but probably no lower than two dollars and a half a square foot, regardless of the type of residential development in the form of apartments. I place the value, average value overall for the whole property within Phase II and III of five dollars a square foot for 30 acres. I didn't measure it and I understand that I took a piece out in the upper left-hand corner that is actually in the project, but I

was asked to leave it out because it wasn't part of the project sale to Mr. Hahn.

Assuming this to be 30 acres, that would indicate $6.5 million as the value of the property for fair market value as of December 1975.

Q Mr. Stahr, did you confirm the details of each sale that you have used as a comparable sale?

A Yes.

Q What did you use to determine the details?

A Well, myself or one of my staff contacted a buyer or a seller or a broker or an interested party. Some of them were a little difficult, because the buyers and sellers were not available, but each one was confirmed; many of them had been used previously.

Q Mr. Stahr, you have described the subject property and its surroundings from the point of view of what streets and developments are in. Would you describe the subject property generally in terms of what utilities are in?

A Well, all of the utilities are in the streets at this time. This was a functioning part of downtown Santa Rosa. The buildings were older and some of them had been seriously affected by the earthquake.

Q Have you read the redevelopment plan for the downtown Urban Renewal Area?

A Yes, I have been through it.

Q Have you read the amendments to the redevelopment plan which added the Phase III project area?

A Well, yes, I have read that, and with you, part of it, but specifically I would want to be able to read it before I answer questions.

Q As a result of your market study, have you

formed an opinion of the fair market value of the downtown Urban Renewal project for uses in accordance with the redevelopment plan?

MR. BRANDT: I object to that question, Your Honor. That doesn't go to any admissible, any issue which is not governed by the substantial evidence test.

MR. SMITH: I thought we had a running objection.

THE COURT: I am going to ask the reporter to repeat that question.

(Record read.)

THE COURT: I am going to overrule the objection and allow the witness to answer, but it's the understanding that the court will entertain a motion to strike and will not preclude you from making such a motion at a later time.

A Yes.

Q What is that value?

A $6.5 million.

THE COURT: I thought that was asked and answered already.

Q What does that come out to per square foot?

A Five dollars per square foot.

Q Could you again state the date of valuation if you haven't already?

A As of December 1975.

Q Now, in your opinion, can Phase II Urban Renewal Area be sold for development solely by private enterprise without any further government expenditure?

MR. BRANDT: I object to that question. I don't think you have established the witness' qualifications to ask it.

THE COURT: I want to hear the question read back. (Record read.)

MR. BRANDT: That presumes facts not in evidence and I don't understand it.

MR. SMITH: I don't know if I understand the question.

THE COURT: Do you understand the question?

THE WITNESS: I think he is asking me if it's salable, Your Honor.

THE COURT: Is that what you are asking, whether it's salable?

MR. SMITH: Perhaps I could rephrase the question. That's what I am asking him. Perhaps I could rephrase the question.

THE COURT: If that's what you are asking, he may answer the question. The question is is it salable, I assume.

Is that your understanding of the question?

THE WITNESS: Yes.

Q You may answer.

A Yes, it's salable.

Q and to be salable —

A May I make a qualification? I'm sorry.

Q Yes.

A I believe there is a building standing, I would like to see down, a hotel.

Q And is that in Phase II or Phase III?

A Phase II. With that exception —

Q In your opinion is the fair market value — strike that.

Does your opinion of fair market value depend upon the city or the Urban Renewal Agency making any

further expenditures of money in the Phase II or Phase III area?

A Nothing other than to tear down the old hotel.

Q In your opinion, Mr. Stahr, can the Phase III property be developed by private enterprise or be marketed?

A Yes.

MR. BRANDT: I object to that question, Your Honor.

THE COURT: Well, is that a motion to strike, then? Is that what that is? You were making a motion to strike?

MR. BRANDT: Yes. It's a motion to strike.

THE COURT: Well, you may make it, but maybe on a separate ground, counsel. I am willing to hear it.

MR. BRANDT: All right. I will reserve it. I will not make it to that particular question.

Q Well, in your opinion, Mr. Stahr, how could the Phase II Urban Renewal Area be marketed so as to achieve fair market value?

A Well, there are several ways. The simplest one would be an aggressive marketing program, parcel by parcel as they deemed fit under whatever controls they thought appropriate. A second way, which would make it probably easier, could be done under leasing the property, either in parcels or in total, and the lease could take, the money, the money could take the form of a percentage of the value or could even be entitlement to a percentage of the gross as the gross increases.

Q In your opinion, Mr. Stahr, if all of the parking lots and garages in the downtown parking district

were to become free parking, would that have a beneficial or a deterimental effect on downtown property?

A It would be benefited.

MR. BRANDT: I move to strike that.

THE COURT: And the basis for the motion?

MR. BRANDT: The basis for the motion is simply that counsel hasn't indicated that benefit pertains — to what he means by benefit. There is no foundation.

THE COURT: Well —

MR. BRANDT: He hasn't established the foundational fact.

THE COURT: I think it a pretty vague question. I don't know that the court can give much weight to it, because there is so little meaning that I can attach to such a vague question and answer it would really go to the weight, I think, counsel.

MR. SMITH: All right.

Q Mr. Stahr, you are familiar with the location of the Imperial Savings & Loan Association facility, are you not?

A That's correct.

Q And do you know whether or not the Imperial Savings & Loan facility is adjacent to a municipal parking garage?

A Yes, it is.

Q And do you know whether or not that municipal parking garage currently charges for parking?

A Yes, they do.

Q And if that municipal parking garage were to become free parking, would that affect the property value of Imperial Savings & Loan Association?

A Yes.

Q And what would be the effect on the property value of the Imperial Savings & Loan Association?

A Well, it would increase, it would be like decreasing the taxes. It would make it easier and more expeditious for people to patronize those buildings or those properties that are adjacent to the parking lot.

Q And you are familiar the Exchange Bank is located at the corner of Fourth and Mendocino, are you not?

A That's correct.

Q And that the Exchange Bank is located adjacent to the municipal parking lot?

A I am.

Q And you know that that municipal parking lot currently charges for parking; is that correct?

A It's metered, that's correct.

Q And if that municipal parking lot adjacent to the Exchange Bank were to become free parking, would that have an

EXHIBIT B

Tuesday, May 17, 1976, At 9 A.M.

THE COURT: Mr. Brandt?

MR. BRANDT: Your Honor, on reconsideration, we have no questions of this witness.

THE COURT: Very well. May this witness be excused?

MR. SMITH: Yes, he may, Your Honor.

THE COURT: Thank you. You are excused.

(Witness excused.)

MR. BRANDT: We do not move to strike his tes-

timony, Your Honor, but feel that it is irrelevant to those issues which we indicated yesterday and hope the court will duly consider our arguments on that point.

MR. SMITH: The plaintiffs will call Dr. Arthur Highman.

THE CLERK: Come forward here, please.

Will you raise your right hand, please. *ARTHUR HIGHMAN,* having been first duly sworn on oath by the clerk, testified as follows:

THE CLERK: And your name, please?

THE WITNESS: Arthur Highman.

THE CLERK: And how do you spell the last name?

THE WITNESS: H-i-g-h-m-a-n.

THE CLERK: Oh, thank you.

DIRECT EXAMINATION

Q (by Mr. Smith) Dr. Highman, would you please state your full name and address?

EXHIBIT C

57. The Court is unable to find or conclude from the evidence presented at trial that it is reasonably forseeable that the decisions contested in these cases will have a material financial effect, distinguishable from their effect on the public generally, on George Sutherland, Michael Panas, George Schmoll, or John Downey, or their employers or the corporations in which they own stock. On October 29, 1974, Agency member Sutherland's boss, Gary Hardisty, as President of the Downtown Development Association, appeared before the Urban Renewal Agency public hearing and spoke in favor of the Hahn shopping center,

and also presented a resolution of the Downtown Development Association supporting the shopping center. Hardisty's Housewares store, Imperial Savings and Loan Association, and the Exchange Bank, as downtown Santa Rosa businesses, are anticipated to benefit by the development of the shopping center in the urban renewal project.

58. The Court is unable to determine or conclude from the evidence presented at trial that any of the decisions contested in these cases would have been different but for the interests of George Sutherland, Michael Panas, George Schmoll, or John Downey, or their employers or the corporations in which they own stock.

59. The defendant City substantially complied with City Code Section 27.147 in connection with the preparation and publication of notice of completion of the EIR for the fiscal year 1975 Community Development Fund Block Grant Application.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

1. In rem jurisdiction over the matters sought to be determined in Action No. 79762 was completed on February 16, 1975.

2. In rem jurisdiction over the matters sought to be determined in Action No. 84237 was completed on February 14, 1976.

3. The Agency's finding that the Hahn Contract was fair and equitable for the land according to its

value for reuse, and that the consideration from Hahn was not less than its fair value for uses in accordance with the redevelopment plan, is supported by substantial evidence contained in the record.

4. The evidence presented at trial was insufficient for the Court to find that the Agency violated 42 United States Code Section 1460(c)(4), the Urban Renewal Handbook Section 7214.1, Health and Safety Code Section 33433 or any other state or federal law with regard to the adequacy of the consideration from Hahn for the shopping center site, or the parts of said site in Phase II and Phase III. The Agency is required to sell property in the redevelopment project area for not less than its fair value for uses in accordance with the redevelopment plan.

5. No evidence was presented at trial from which the Court can find or conclude that the Agency has acted in excess of its authority in approving the Hahn Contract or in taking any other action relating to the redevelopment of the urban renewal project.

6. The City Council's finding that Phase III is a blighted area is supported by substantial evidence contained in the record. The City Council was required to make a finding that the Phase III redevelopment area is blighted within the meaning of the Community Redevelopment Law.

7. Neither the redevelopment plan as amended, nor the sale of the shopping center site to Hahn, nor the Hahn Contract constitutes a gift of public funds or a waste or misuse of public funds.

8. The addition of Phase III to the urban renewal project and the continued use of tax revenues from

Phase I allocated to the Agency pursuant to Article XVI, Section 16 of the California Constitution and the Community Redevelopment Law to pay the costs of redevelopment in Phase II and Phase III are lawful and authorized by the California Constitution and the Community Redevelopment Law, and do not constitute a waste or misuse of public money, a gift of public funds, or a violation of plaintiffs' rights under Article I, Section 1, 2, 11, 12 or 21 of the California Constitution, Article XIII, Section 25 of the California Constitution or any constitutional rights of plaintiffs.

9. The City Council's finding that the urban renewal project and the redevelopment plan, as amended, are in the interest of the public's health, safety and welfare and will effectuate the purposes and policy of the Community Redevelopment Law is supported by substantial evidence contained in the record.

10. Notwithstanding any resulting benefit to Hahn, neither the Hahn Contract nor the proposed expenditure of public funds for the urban renewal project violates plaintiffs' right to equal protection of the law under California Constitution Article I, Sections 11 and 12, nor their rights to life, liberty and property and to engage in a business under Article I, Section 1 of the California Constitution, nor the equal protection clause or due process clause of the Fourteenth Amendment of the United States Constitution, nor do the Hahn Contract or proposed expenditures constitute a monopoly, unlawful discrimination, an unfair practice, or unfair competition.

11. Neither the redevelopment plan as now amended, nor the Hahn Contract, nor any other con-

tract or action contested by plaintiffs, is a contract, combination, or conspiracy in restraint of trade, or an action in furtherance of a contract, combination or conspiracy in restraint of trade.

12. Phase I, Phase II and Phase III constitute a single redevelopment project under the California Community Redevelopment Law.

13. The Hahn shopping center, off-street parking facilities and other public improvements, and the street closures of the Phase II amendment are not inconsistent with the Santa Rosa General

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is supported by substantial evidence contained in the record and was not an abuse of discretion.

28. The urban renewal project EIR was completed in compliance with the California Environmental Quality Act.

29. The application EIR was completed in compliance with the California Environmental Quality Act.

30. Plaintiffs' Eleventh Cause of Action in Action No. 79762, which alleges that proposed financing of the urban renewal project violates the State Constitution and state law, is premature.

31. No evidence was present at trial which suggests the conclusion that plaintiffs are barred by the doctrine of laches, or unclean hands, or for failure to exhaust their administrative remedies from bringing any of the causes of action set forth in these consolidated cases.

32. None of the plaintiffs' claims are barred by the doctrine of res judicata or collateral estoppel.

33. Plaintiffs have standing to sue and have an interest in the redevelopment activities complained of as taxpayers under Code of Civil Procedure Section 526a and are interested persons under Code of Civil Procedure Section 863.

34. Concerning the environmental impact reports, the Court has applied the substantial evidence, and in addition thereto, has independently determined from the record of the entire proceeding before defendants and the evidence presented that the environmental impact reports are adequate. Concerning the other findings required to be made by defendants, the Court has applied the substantial evidence test only and has made no independent determination.

35. Ordinance No. 1741 is legal and valid.

36. Ordinance No. 1791 is legal and valid.

37. The activities of defendants contested in this action, including, without limitation, the amendments to the project

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the County of Sacramento; I am over the age of eighteen years and not a party to the within above entitled action; my business address is 555 Capitol Mall, Suite 950, Sacramento, California 95814. On October 22, 1976, I served the within REPLY OF DEFENDANTS CITY OF SANTA ROSA AND URBAN RENEWAL AGENCY OF THE CITY OF SANTA ROSA TO PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT and SECOND AFFIDAVIT OF RICHARD E. BRANDT IN

SUPPORT OF MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS CITY OF SANTA ROSA AND URBAN RENEWAL AGENCY OF THE CITY OF SANTA ROSA on the parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box at Sacramento addressed as follows:

Mr. William M. Brinton, Esq.
Mr. Ricardo J. Hecht, Esq.
Cotton, Seligman & Ray
Alcoa Building, Suite 1400
One Maritime Plaza
San Francisco, California 94111

Mr. James L. Browning, Jr.
United States Attorney
Mr. Paul E. Locke
Assistant United States Attorney
P.O. Box 36055
450 Golden Gate Avenue
San Francisco, California 94102

Mr. William N. Willens
Barrett, Stearns, Collins, Gleason & Kinney
1150 Union Bank Tower
Del Amo Financial Center
Torrance, California 90503

I, Mary M. Miller, declare under penalty of perjury that the foregoing is true and correct.

Executed on October 22, 1976, at Sacramento, California.

Mary M. Miller

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United States District Court
Northern District of California
Civil Action No. 74-2429 WWS

City of Rohnert Park, a municipal corporation,
Plaintiff,

v.

James T. Lynn, etc., et al.,
Defendants.

PLAINTIFF'S SUPPLEMENTAL BRIEF IN OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT AND TO MOTION TO DISMISS

I

PRELIMINARY STATEMENT

The purpose of this supplemental brief is to establish, *inter alia,* that the allegations of Plaintiff's claim entitle it to injunctive relief, including the kind of injunctive relief prescribed by Section 16 of the Clayton Act (15 U.S.C. 26). To this end, we will show that defendants' scheme for the creation of a massive regional shopping center in Santa Rosa is *per se* violative of Sections 1 and 2 of the Sherman Act, because it is

intrinsically monopolistic, and that this scheme or conspiracy threatens "loss or damage" to Plaintiff and to some of its inhabitants, property owners and taxpayers. From these premises will follow the conclusion that Plaintiff is "entitled to sue for and have injunctive relief" pursuant to said Secton 16 of the Clayton Act in accord with doctrine of the following cases:

> *Bratcher* v. *Akron Board of Realtors,* 381 F.2d 723, 724 (6 Cir. 1967).[1]
>
> *State of California* v. *Automobile Manufacturers Association*, 481 F.2d 122, 130-131 (9 Cir. 1973).[2]
>
> *State of Washington* v. *Automobile Manufacturers Association,* 538 F.2d 231, 235-237 (9 Cir. 1976).

II

ARGUMENT

Excess Capacity, a Monopolistic Tool.

At the hearing of defendants' motion we stated, in effect, that defendants were violating the Sherman Act by means of "excess capacity," and that this entitled Plaintiff to the preventive relief provided by Section 16 of the Clayton Act.

In this connection, it might be noted that economists point to excess capacity as indicative of monopoly

[1] "The Department of Justice has intervened in this court as amicus curiae on behalf of the appellants, arguing that the complaint states a claim upon which relief can be granted under the antitrust laws" (p. 724).

[2] " . . . cities . . . might sue to vindicate such of their own proprietary interests as might be congruent with the interests of their inhabitants" (p. 131).

power,[3] and that our courts view it as a means of effectively anticipating and forestalling all competition.[4]

Our statement was not an improvisation and that this is so is borne out by some of the allegations set forth in Plaintiff's complaint, filed on *November 19, 1974*. These allegations may be summarized in relevant part as follows:

> Santa Rosa is located some seven (7) miles north of Rohnert Park. Rohnert Park has designated certain property within its boundaries as a site for a regional shopping center (Complaint, p. 3, lines 20-31).
>
> There is currently in the Rohnert Park area a demand for approximately 627,000 square feet of retail space. There are developers who are ready, willing and able to supply this demand, but they are inhibited from so doing by the threat of a competing center planned by defendant Agency (Complaint, p. 4, lines 21-27).
>
> Defendant Agency has entered into an agreement with defendant Developer, with the consent of defendant HUD, to develop a competing shopping center on a thirty-two (32) acre site in downtown Santa Rosa (Complaint, p. 5, lines 6-12; p. 6, lines 24-26).
>
> There are presently approximately 748,000 square feet of general merchandise space available in Santa Rosa. Under the terms of said agreement defendant Developer will construct an additional 438,000 square feet of general merchandise space, thus increasing the total of such space in Santa Rosa to 1,186,000 square feet. Under the terms of said

[3] E.g. M. A. Adelman, Effective Competition and the Antitrust Laws, 61 Harv. L. Rev. 1289, 1297-1298 (1948).

[4] *United States* v. *Aluminum Co. of America,* 148 F2d 416, 430-431 (2 Cir. 1945); Atty. Gen. Nat. Com. Rep. 56-60 (1955).

> agreement defendant Developer will also build 322,000 square feet of other retail space in the proposed shopping center site. "*The excess retail space capacity to be so created will not be absorbed by the demand therefor until some time after the year 1980.*"[5] Hence this project will render noncompetitive and impractical any project for a retail center in the proximity of Santa Rosa (Complaint, p. 9, lines 18-30).[6]

It is apparent from the above summarized allegations that under the agreement between the defendant Agency and the defendant Developer, the existing retail sale space in Santa Rosa is to be almost *doubled,* and this is confirmed by admissions made by the defendants who are parties to the agreement. In their answer the Santa Rosa defendants admit that there are 748,000 square feet of general merchandise space in Santa Rosa, and that under the defendant Developer's proposal there will be built approximately 703,000 square feet of general merchandise and retail space (Santa Rosa defendants' answer, p. 8, lines 13-16). On the other hand, defendant Developer admits in its answer that the land disposition agreement requires it to "construct a shopping center containing approximately 713,500 square feet of retail space" (Defendant Developer's answer, p. 6, line 3, to p. 7, line 1).

While Plaintiff alleges in its complaint that the additional retail space to be so built "will not be *absorbed*

[5] All emphasis added to quoted material is supplied by us, unless otherwise indicated.

[6] Plaintiff's allegations above summarized have not been "pierced" by affidavits or other materials upon which motions for summary judgment may be grounded, and hence Plaintiff may *rest upon them* to establish that it has a valid claim for relief.

until some time after *1980,*" defendant HUD asserts "that the fully occupied shopping center should be able to *absorb* most of the needed growth of commercial space in Santa Rosa *until* about *1990.*"[7]

These facts would seem to indicate that those involved in the project are about to invest millions in retail space that will not be usefully employed for a period of between five (5) to ten (10) years, and that someone will have to pay the upkeep of this excess capacity for a similar period. Applying the standard care of the "ordinary reasonably prudent man"[8] to those so involved, it would appear that they are embarking on a most reckless course of conduct.

The proposed shopping center is not a civic nonprofit operation. It is instead a commercial enterprise to be owned and operated by a multibillion dollar consortium consisting of Sears, Macy and defendant Developer,[9] and this being so one might inquire why these extremely succcessful entrepreneurs are about to engage in such seemingly unwise course. The answer to such an inquiry is that experience, logic and the law teach that this is but an initial move in a plan or scheme which, carried out, will result in a monopoly.

This becomes clear when one considers that there is nothing in the record of this case that validly explains why this excess of capacity is necessary to the development of the business of the consortium. Absent such an explanation, one must conclude that the consortium

[7] E.I.S., Daugherty depo., Ex. 1, p. 114.

[8] Such a standard is applicable in antitrust. *Nash* v. *United States,* 229 U.S. 373, 376-378, 57 L.Ed. 1232.

[9] Hahn depo., pp. 12-14; 18-20.

is acting with calculation to head off every attempt by others to supply any part of the demand for retail space in the area. Thus we have seen at least one abortive attempt to enter this field in connection with the frustrated development of Plaintiff's regional shopping center site. Certainly, no "ordinary reasonably prudent" developer would choose to place itself in a collision course with Hahn-Macy-Sears Juggernaut particularly when it is evident that it enjoys the wholehearted and concerted support of HUD and defendant Agency. It is therefore plain that the combination constituting this group has sought and obtained full control of the retail space market in the Santa Rosa Trade Area in violation of the Sherman Act, and for this reason the following taken from the opinion of Judge Learned Hand in *United States* v. *Aluminum Co. of America,* 148 F.2d 416, 430-431 (2 Cir. 1945) is entirely applicable herein:

> " . . . There were at least one or two abortive attempts to enter the industry, but 'Alcoa' effectively anticipated and forestalled all competition, and succeeded in holding the field alone. True, it stimulated demand and opened new uses for the metal, but not without making sure that it could supply what it had evoked. There is no dispute as to this; 'Alcoa' avows it as evidence of the skill, energy and initiative with which it has always conducted its business; as a reason why, having won its way by fair means, it should be commended, and not dismembered. We need charge it with no moral derelictions after 1912; we may assume that all it claims for itself is true. The only question is whether it falls within the exception established in favor of those who do not seek, but cannot avoid, the control of a

> market. It seems to us that that question scarcely survives its statement. *It was not inevitable that it should always anticipate increases in the demand for ingot and be prepared to supply them. Nothing compelled it to keep doubling and redoubling its capacity before others entered the field. It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face very new comer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel.* Only in case we interpret 'exclusion' as limited to manoeuvres not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not 'exclusionary.' So to limit it would in our judgment emasculate the Act; would permit just such consolidations as it was designed to prevent."

The powerful combination that has thus been so carefully and painstakingly put together may be fairly described as the "extraordinary reasonably prudent" monopolist, and hence this additional remark by Judge Learned Hand becomes especially apt here:

> " . . . In order to fall within §2, the monopolist must have both the power to monopolize, and the intent to monopolize. *To read the passage as demanding any 'specific,' intent, makes nonsense of it, for no monopolist monopolizes unconscious of what he is doing.* So here, 'Alcoa' meant to keep, and did keep, *that complete and exclusive hold* upon the ingot market with which it started. That was to 'monopolize' that market, however innocently it otherwise proceeded. So far as the judgment held that it was not within §2, it must be reversed." (148 F.2d 432).

So, we have here demonstrably a "current ongoing conspiracy" prohibited by the Sherman Act whose objective is to monopolize a substantial portion of the new general retail merchandise space needed to supply the existing and future demand therefor in the Santa Rosa Trade Area.

This combination is in fact attempting to "run a corner" on the new general retail merchandise space in the Santa Rosa Trade Area. The necessary and unavoidable result of this act is to *compel* any merchant desiring to engage in the retail trade in this area to rent the space it needs for the storage, display and sale of its goods from the combination on terms and rents entirely within the control of the combination. *An aggravating and unnatural feature which is disclosed here by the record is that these merchants will be in effect the tenants of their competitors, i.e., Macy and Sears*.[10] The rents and terms that can thus be imposed by the combine can in turn artificially affect the price of goods to be sold, thereby hampering the public in satisfying its needs and tastes. The goods whose prices would be so affected concededly move in the channels of interstate commerce, and accordingly the Court has before it an anticompetitive situation which is *per se* violative of the Sherman Act (*United States* v. *Patten*, 222 U.S. 525, 541-543, 57 L.Ed. 333 (1913).)

Plaintiff is Entitled to Relief Under Section 16 of the Clayton Act, Even Though the Harms Suffered By It May be Unrelated to Competition

That a regional shopping center with the abundance

[10] Hahn depo. pp. 18-20.

of excess retail capacity planned for the Santa Rosa regional shopping center has the power to threaten and inflict great economic loss and injury to commercial developments in all neighboring communities, including Plaintiff, has from the beginning been *well within the contemplation of those engaged in planning it*. Thus we find the following in a report rendered to defendant Agency by one of its appraisers:

> "*The prompt development of the Santa Rosa center will be a strong inhibitor of the development of any new center in the region.* While the proposed Rohnert Park center is premature and not a serious possibility at this time, *the actuality of the subject center would kill off any possibility of a major development in Rohnert Park for a long time to come.*"[11]

This unrepudiated and voluntary confession manifests a clear intent to smother any competing commercial development in the cradle.

This intent so blatantly expressed threatens "loss or damage" as follows:

(a) To Plaintiff, in its proprietary capacity, as owner of property within the commercial area;

(b) To those persons and entities who own property within the commercial area, and whom Plaintiff represents as agent and trustee in connection with the development of the area;

(c) To Plaintiff as a community, in that defendants' conduct limits the opportunities of its inhabitants as a whole, retards its development, and relegates it to an inferior economic position

[11] Burns's depo., Ex. 30, Ratcliff's appraisal, p. 24.

vis-à-vis Santa Rosa.

Hence, even though the harms suffered by Plaintiff and the community it represents may be "unrelated to competition" it is entitled to relief under Section 16 of the Clayton Act, because that relief will serve here to enjoin an ongoing conspiracy to violate the Sherman Act. In support of this proposition we quote the following excerpts from the opinion in *State of Washington* v. *Automobile Manufacturers Association,* supra:

> "Appellants are correct in arguing that §16 may provide for relief for purposes other than restoring competition. In *Georgia* v. *Pennsylvania R. Co.,* 1945, 324 U.S. 439, 446-53, 65 S.Ct. 716, 89 L.Ed.1051, the Court held that the State of Georgia could seek relief under §16 to enjoin northern railroad companies from conspiring to fix discriminatory railroad rates to the detriment of Georgia's economy. Georgia did not seek the injunction in order to restore competition among the railroads; rather, the purpose was to terminate the conspiracy and eliminate its results, thus improving the economic conditions of the state and its citizens. Similarly, the Sixth Circuit has held that a conspiracy by a board of realtors to exclude Blacks from purchasing homes in certain areas may be enjoined under §16. An effect of an injunction would be to further civil rights policy, but the complaint charged impediments to the flow in interstate commerce of persons, mortgage financing and building materials. *Bratcher* v. *Akron Area Board of Realtors,* 6 Cir., 1967, 381 F.2d 723. In those cases the injunctions were directed against a current ongoing conspiracy. Thus, the cases stand only for the proposition that §16 provides relief which may have effects other than restoring competition *when that relief has the effect of ending an ongoing antitrust violation,* one of the functions of the antitrust laws." (538 F.2d 235, footnote omitted.)

. . . . . .

> "The omission of the words 'business or property' in §16 certainly makes that section 'far broader that §4.' *Hawaii* v. *Standard Oil Co.,* 9 Cir., 1970, 431 F.2d 1282, 1284, *aff'd,* 1972, 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184. It does not follow that when Congress adopted §16 it intended to permit remedies which would serve none of the purposes for which the law was passed. Plaintiffs who have not been injured in their business or property, *do have standing under §16 to seek injunctive relief designed to prevent harms which may be unrelated to competition, but only when that relief serves the antitrust function of ending an ongoing violation. . . . .*" (538 F.2d 237.)

Plaintiff is entitled to preventive relief not only under Section 16, but also pursuant to *Data Processing Service* v. *Camp,* 397 U.S. 150, 25 L.Ed. 184 (1970).

Respectfully submitted,

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United States District Court
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City of Rohnert Park, a municipal corporation,
Plaintiff,

v.

James T. Lynn, etc., et al.,
Defendants.

CERTIFICATE OF SERVICE
BY MAIL

I, the undersigned, RICARDO J. HECHT, one of the attorneys for the Plaintiff in the above-entitled action, hereby certify that I have served copies of the foregoing "Plaintiff's Supplemental Brief in Opposition to Motions for Summary Judgment and to Motion to Dismiss" on the attorneys for the defendants by depositing copies thereof in the United States mail, postage prepaid, in envelopes addressed to said attorneys at their respective addresses which addresses are the last addresses of said attorneys known to me.

Dated: November 8, 1976.

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United States District Court
Northern District of California
Civil Action No. 74-2429 WWS

City of Rohnert Park, a municipal corporation,
Plaintiff,

v.

James T. Lynn, as Secretary of the United States Department of Housing and Urban Develoment, City of Santa Rosa, a municipal corporation, Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic, and Ernest W. Hahn, Inc., a California corporation,
Defendants.

SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS OF DEFENDANTS, CITY OF SANTA ROSA AND URBAN RENEWAL AGENCY OF THE CITY OF SANTA ROSA

I

PRELIMINARY STATEMENT

Plaintiff City of Rohnert Park seeks to enjoin the Defendants the Secretary of Department of Housing and Urban Development ("HUD"), the City of Santa Rosa and its Urban Renewal Agency (the "Santa Rosa

Defendants"), and Ernest W. Hahn, Inc. ("Hahn"), from proceeding with the development of a regional shopping center in the Santa Rosa Center Urban Renewal Project on the ground that the proposed development allegedly violates Sections 1 and 2 of the Sherman Act (15 U.C.C., Sections 1 and 2). Plaintiff claims it is entitled to sue for such relief under Section 16 of the Clayton Act (15 U.S.C., Section 26).

The purpose of this supplemental brief is to explain why the facts as set forth in the affidavits submitted to the Court raise no genuine issue of material fact as to either the charge of violation of the Sherman Act or the Plaintiff's claimed entitlement to sue.

In opposing the Defendants' motions for summary judgment, Plaintiff has the burden of producing evidence which, viewed most favorably to Plaintiff, would permit the inference that Defendants have violated the Sherman Act and the Plaintiff has been injured by the violation. Plaintiff cannot rest its opposition on the allegations of the Complaint. (*Modern Home Institute, Inc.* v. *Hartford Acc. & Indem. Co.*, 513 F.2d 102 (2d Cir. 1975); *Scranton Construction Co., Inc.* v. *Litton Industries Leasing Corp.*, 494 F.2d 778 (5th Cir. 1974); *cert. denied* 95 S. Ct. 774, 419 U.S. 1105, 42 L.Ed. 2 800.

The City of Rohnert Park's opposition to the motions is inadequate because it fails to present sufficient facts to support inference that it has been injured or an inference of two factual premises essential to its antitrust claims, *i.e.*, (1) that Santa Rosa redevelopment will result in a competitive advantage for Hahn and its proposed shopping center, and (2) that the Santa Rosa

shopping center will create an excess of available retail space. Even accepting the factual conclusions of the complaint as true, Plaintiff's antitrust claim is without merit because it alleges, at most, only the creation of a competitive advantage for Hahn as an incident of governmental action. As the Santa Rosa Defendants have explained in detail in their earlier brief, government action creating such a competitive advantage does not violate the antitrust laws.

No facts before the Court allow the insinuation that repeated construction of excess retail space is being used as a tool to maintain an existing monopoly. Neither Hahn nor its prospective tenants, Sears and Macys, has a monopoly of retail facilities in the suggested relevant market; and the redevelopment proposal is to build a single shopping center, not to undertake a continuing plan for construction of retail facilities. Plaintiff has not alleged or pleaded the use of any exclusionary market device condemned by the Sherman Act. Absent use of such a prohibited exclusionary device by Defendants, no Sherman Act violations can be established on the facts alleged even if real estate developers and retailers are inhibited by lack of demand from developing a shopping center in Rohnert Park. Finally, Plaintiff has failed to plead or present facts that might establish that it is entitled to sue. Plaintiff cannot sue for injury to its citizens, inhabitants or property owners because only states and the federal government can sue as *parens patriae*. Plaintiff must sue, if at all, in a proprietary capacity. Here Rohnert Park has no standing to sue in such capacity because it has not pleaded or presented facts

showing loss or damage suffered as owner of the library site which is the only property it owns in the commercial area allegedly affected by Santa Rosa development.

II

Argument

A. PLAINTIFF HAS FAILED TO ALLEGE OR PRESENT FACTS SUFFICIENT TO SUPPORT ITS CLAIM THAT DEFENDANTS' ACTIONS VIOLATE SECTION 1 OR SECTION 2 OF THE SHERMAN ACT.

Plaintiff's antitrust claim is predicated on two factual contentions: (1) that the proposed shopping center of Hahn will create a surplus of retail sales space in Sonoma County and that Hahn, apparently by purchasing land at a price allegedly below fair value, will have a competitive advantage that will inhibit potential developers and retailers from developing a shopping center site in the City of Rohnert Park. These two factual contentions are disproved by unrefuted facts before the Court.

The fallacy of Plaintiff's inadequate land price premise is apparent from the explanation of the public financing of the project set forth in the affidavits of Mr. Burns and Mr. Fitzhugh. Phases I and II of the Santa Rosa project are federally assisted pursuant to a loan and grant contract between the Urban Renewal Agency and HUD. By the contract, the federal government grants or guarantees loans to the Agency for the costs of redevelopment. The federal government also bears three-fourths of the net project costs. Net project costs are computed by subtracting the proceeds

from the Agency's land sales from the costs of acquiring and clearing the land, relocating residents and businesses, and administering the redevelopment program. The Agency may contribute its one-fourth of the net costs either in cash or by in-kind grants in aid. The latter category of local contribution includes credit for the costs of constructing public facilities that serve the project.

The statutory formula for sharing public costs between federal and local governments creates conflicting fiscal interests. In the absence of contrary federal restrictions, the local government could increase the specified federal contribution to the project by the simple expedient of giving away land or selling it at a deflated price. Assuming a constant total public cost, for each dollar reduction in the sale price of land the federal government must contribute an additional seventy-five cents to the project (three-fourths of the resulting $1 increase in "net" cost). The local agency may receive consideration from the developer for such a decrease in the land sale price by having the developer bear a disproportionate share of the costs of public improvements. If these public improvements qualify as local grants in aid, each dollar of disposition contract consideration transferred from land price to public improvement construction cost increases the federal share of the public costs by one dollar and decreases the local share of public costs by one dollar.

The foregoing aspects of the project financing are critical to analysis of the Plaintiff's antitrust claims and the other issues purportedly raised by this suit. The requirements of federal law and regulations that

the Agency obtain at least two appraisals from independent appraisers for each land sale, that the sale price be not less than the fair value for uses in accordance with the redevelopment plan, and that HUD approve all dispositions are obviously intended to protect the federal government from local government attempts to shift the burden of public costs by reducing land prices while requiring disproportionate developer contributions to public improvement costs. Contrary to Plaintiff's antitrust theory, land price is wholly meaningless as a measure of the adequacy of the consideration paid by the developer and as an indication of the competitive advantage or disadvantage to the developer arising from a redevelopment project land disposition.

The only rational measure of competitive advantage or disadvantage of Hahn *vis-a-vis* other real estate developers is total cost of development, not simply one isolated element of cost, such as land price. By the contract for disposition of the land in the urban renewal project, Hahn will pay $2,000,000 for the land in Phase II, and, depending on the contract alternative selected in the sole discretion of the Agency, will pay $1,000,000 for the Phase III land, contribute between $5,500,000 and $7,500,000 towards the construction of parking facilities to be dedicated to public use, pay $401,000.00 per year in lieu of parking district assessments, pay various other fees and public costs, and develop the site in compliance with plans approved by the Agency.

The only facts before the Court concerning the adequacy of this total contract consideration of Hahn is

the testimony of Mr. Hahn at the public hearings on the shopping center proposal (see pp. 8-9 of Defendants' Response to Plaintiff's Brief in Opposition to Motions) and at his deposition. This evidence shows that every other disposition contract of the Hahn Company is either more favorable to Hahn, or at least as favorable to Hahn, as the disposition contract for the land in the Santa Rosa project. (Hahn Depo., pp. 36-42.) Hahn is paying approximately $6,000,000 more for the opportunity to develop in downtown Santa Rosa than he would be required to pay for the opportunity to develop in a suburban area, such as the Rohnert Park site. (Burns Affidavit, Exhibit A, Transcript 10/29/74, pp. 12-15.) Since the only evidence before the Court is contrary to Plaintiff's competitive advantage premise, the Defendants are entitled to summary judgment without regard to the merit or lack of merit of Plaintiff's legal theory.

The second factual premise of Plaintiff's theory that is contradicted by the evidence without response from Plaintiff is the allegation that the Santa Rosa shopping center will create an excess of retail store space. Plaintiff asserts (Complaint, p. 9, lines 18-30) that the retail space of the proposed center will not be absorbed by the demand therefor until sometime after 1980. The facts set forth in the two affidavits of James K. Burns submitted in support of these motions indicate that land acquisition has not yet begun for Phase III, which is an integral part of the shopping center site. Considering the requirements of acquisition, clearing, relocation and construction, it is apparent that even if demand to 1980 will be absorbed, the time, if any, be-

tween availability of the shopping facility and demand for the entire retail space constructed will be of minimal duration.

The proposed Santa Rosa regional center will involve the construction of slightly more than 700,000 square feet of retail space (Plaintiff's Supplemental Brief, p. 4), and eliminate the 72,000 square feet of the existing Sears store. Plaintiff's contention that potential developers and retailers in Rohnert Park will be injured by development in Santa Rosa can be true only if Rohnert Park and Santa Rosa are part of a single market. Plaintiff alleges (Complaint, p. 4, lines 21-27) that two years ago, at the time of the filing of the Complaint, a demand for 627,000 square feet of retail space existed in Rohnert Park alone. On the basis of Plaintiff's own allegations, the Santa Rosa shopping center will provide only enough retail space to replace the old Sears store and satisfy the demand to the extent it existed two years ago in a subpart of the market. The shopping center study (Affidavit of Burns, Exhibit C, "Appendix E, Volume III — EIR"), the only evidence before the Court relating to demand for retail space, shows that unsatisfied *department store* demand alone totaled 600,000 square feet in 1975 and was predicted to reach 783,000 square feet by 1980. No facts presented to the Court show, or tend to show, any excess capacity that might inhibit the development of retail sales capacity in the City of Rohnert Park for current demand not satisfied by a Santa Rosa facility or future demand in the area.

Even assuming factual support could be found for the Plaintiff's excess capacity theory, the theory itself,

as a matter of law, fails to state a claim based on the Sherman Act. The only case cited by Plaintiff for the proposition that "excess capacity" is germane to application of the antitrust law is *United States* v. *Aluminum Co. of America,* 148 F.2d 416 (2d Cir. 1945) ("Alcoa"). The defendant in the Alcoa case controlled more than 90% of the virgin ingot aluminum manufacturing in the United States and forestalled the one or two abortive attempts of others to enter the industry by expanding its capacity to meet anticipated future demand. The question presented to the Court and resolved against Alcoa was whether notwithstanding Alcoa's monopoly position it was entitled to the protection of the "thrust upon" monopoly defense considering its calculated expansion of production facilities to forestall competition from newcomers to the market who might otherwise serve or satisfy increased future demand.

The mere statement of the facts of the Alcoa case refutes the suggestion that it is applicable in the circumstances of shopping center development in Sonoma County. Hahn does not have a monopoly of shopping centers in Sonoma County. It does not own any such centers and is not involved in developing any in the County except the downtown center. Macys presently owns no department store in the area; if the development is completed, Sears will still own only a single store in the area. The defendants in this action do not rely on the protection of a "thrust upon" defense to the charge of monopoly. The undisputed facts show that neither Hahn nor the anticipated department store tenants of the Santa Rosa shopping center now have,

nor will have, a monopoly in real estate development, shopping center ownership, or retail trade in Sonoma County or any relevant market.

Apart from the monopoly allegations, Plaintiff's antitrust claim reduces to an argument that Hahn competitors will be inhibited by competition. There is no suggestion in the Complaint or in any facts presented to the Court that Hahn will be able to attract tenants except by the normal means of competition, by lowering prices and offering better services. The market sufficient to sustain only one regional shopping center, depicted in the Complaint, resembles the market considered in *Union Leader Corp.* v. *Newspapers of New England, Inc.,* 284 F.2d 582 (1st Cir. 1960). In *Union Leader,* the Court, after noting that the town of Haverhill, Massachusetts could support only one daily newspaper and might be termed a natural monopoly, indicated that either of two competing newspapers in that town could vigorously pursue their own interests even though the natural consequence of the acts of competition of each would be to drive the other newspaper from the market. The Court applied the Sherman Act as follows:

> "It was a foregone conclusion that if successful the Journal would eventually drive the Gazette out of business, and, naturally, Union Leader proposed to succeed. But intending the natural consequences of acts which are in all respects lawful, does not constitute the 'exclusionary intent' that is a prerequisite for finding a violation of section 2. In other words, a natural monopoly market does not of itself impose restrictions on one who actively, but fairly, competes for it, any more than it does on one who passively acquires it. (284 F.2d 582, 584 (1960).)

In *Bailey's Bakery, Ltd.* v. *Continental Baking Co.,* 235 F.Supp. 705 (9th Cir. 1964), the Ninth Circuit faced a similar natural monopoly market with respect to the sale of bread in Honolulu. The Court reiterated that a monopoly resulting from nonpredatory and essentially fair competitive practices is not condemned by the Sherman Act. The Court stated:

> "What is condemned its (sic) growth by business methods designed for and having the effect of impeding new entry into the market, or excluding those whose occupancy is already precarious, by recognizably exclusionary devices. Competing fairly and aggressively, regardless of the consequences to one's rivals is not condemned. (235 F.Supp. 705, 718 (1974).)

The lesson of the *Union Leader* and *Bailey's Bakery* cases is that fair and vigorous competition that leads to a monopoly or inhibits or excludes all but a single competitor from the market is not condemned by the Sherman Act. It is condemned only if it is accomplished or maintained by "recognized exclusionary devices" prohibited by the act. Indulging in every inference and presumption in favor of Plaintiff, the most that has been alleged by this Complaint is that only one regional shopping center can be supported by the demand of Sonoma County and the Hahn center proposed for downtown Santa Rosa will be that shopping center because of a competitive advantage derived from the government redevelopment programs. This restatement of the allegation shows that the analysis of the case must ultimately return to those decisions,

such as *Gibson & Perrin Co.* v. *City of Cincinnati,* 480 F.2d 936 (1973), which hold that incidental benefits from government activities are not violative of the Sherman Act. The incidental competitive advantage to Hahn from redevelopment is not a "recognized exclusionary device" and cannot be the basis of a Sherman Act claim even if the result is the consequence alleged in the complaint.

B. PLAINTIFF LACKS STANDING TO SUE UNDER SECTION 16 OF THE CLAYTON ACT.

To establish standing under Section 16 of the Clayton Act (15 U.S.C., Section 26), the City of Rohnert Park must show, first, that the Defendants have violated the antitrust laws, and second, that the Plaintiff is threatened with loss or damage as a result of the violation. *Gomberg* v. *Midvale Co.,* 157 F. Supp. 132 (D.C. Pa. 1955). For the reasons set forth in the immediately preceding section, Plaintiff cannot show the first prerequisite: violation of the law. Plaintiff has also failed to show any loss or damage cognizable under Section 16.

The complaint alleges that the City of Rohnert Park owns land at the site zoned for regional shopping center within its jurisdiction. Testimony of the City Manager, Mr. Callinan, in his deposition indicates that that land is in fact a library site donated to the City by Codding Enterprises. (Affidavit of Joseph E. Coomes, Jr., Exhibit A and Exhibit B). The Plaintiff is not engaged in real estate development, in retail sales, or in land speculation. The only nexus between the City of Rohnert Park and the land held for commercial development in the so-called regional shopping center site in Rohnert Park is that the Plaintiff, in its governmental capacity, has formed assessment districts and cooperated in the construction of public improvements in contemplation of future development. No facts presented or alleged suggest that the City of Rohnert Park has a proprietary interest in any property in its jurisdiction except property held for public use.

Plaintiff asserts an entitlement to standing under Section 16 on the basis of *State of Washington* v. *Automobile Manufacturers Association,* 538 F.2d 231 (9th Cir. 1976), which indicates that Section 16 may provide relief for purposes other than restoring competition when the relief has the effect of ending an ongoing antitrust violation. However, Plaintiff's argument overlooks that, as a prerequisite of standing, Section 16 also requires "loss or damage" cognizable in courts of equity. *In re Multidistrict Vehicle Air Pollution MDL No. 31,* 481 F.2d 122 (9th Cir. 1973), discusses in detail the prerequisites for standing under Section 16 and states that injury to the public may be the subject of relief sought by the United States Government or a state government as *parens patriae,* but as to other political entities, a different rule applies:

> "On the other hand, political subdivisions such as cities and counties, whose power is derivative and not sovereign, cannot sue as *parens patriae,* although they might sue to vindicate such of their own proprietary interests as might be congruent with the interests of their inhabitants." (481 F.2d 122, 131 (1973).)

The *Multidistrict Vehicle Air Pollution* case dictates

that a suit by Rohnert Park in its role as a government to protect the interests of its citizens cannot be entertained even if it only seeks injunctive relief under Section 16. This holding requires rejection of the argument that Plaintiff can sue to protect the persons and entities who own property within the Rohnert Park Regional Shopping Center site, or for its inhabitants as a whole. (Plaintiff's Supplemental Brief, p. 8(b), (c).) As to Plaintiff's other claimed basis for suit — its ownership of the library site within the commercial area (Supplemental Brief, p. 8(a)) — no standing to sue has been shown because the proprietary interest in a library site is not a proprietary interests "congruent" with the proprietary interest of those real estate owners and developers or potential real estate owners and developers who might develop commercial and business facilities in the Plaintiff City. No facts are alleged or presented to the Court which show the possibility of loss, damage or injury to the Plaintiff's library site proprietary interest.

Plaintiff lacks standing to sue under Section 16 because the only injury alleged in the Complaint, or suggested in Plaintiff's arguments, is a general economic injury to the citizens and inhabitants of the City of Rohnert Park. No legal authority has been offered for the proposition that law or equity will afford any relief for such a remote economic injury except where standing is conferred to a government *in parens patriae*.

Dated: November 18, 1976.

McDONOUGH, HOLLAND,
SCHWARTZ & ALLEN
A Professional Corporation

By Richard E. Brandt

Attorneys for Defendants Urban Renewal Agency of the City of Santa Rosa and the City of Santa Rosa

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the County of Sacramento; I am over the age of eighteen years and not a party to the within above-entitled action; my business address is 555 Capitol Mall, Suite 950, Sacramento, California, 95814. On November 18, 1976, I served the within SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS OF DEFENDANTS CITY OF SANTA ROSA AND URBAN RENEWAL AGENCY OF THE CITY OF SANTA ROSA on the parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box at Sacramento addressed as follows:

Mr. William M. Brinton, Esq.
Mr. Ricardo J. Hecht, Esq.
Cotton, Seligman & Ray
Alcoa Building, Suite 1400
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San Francisco, California 94111

Mr. James L. Browning, Jr.
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Mr. Paul E. Locke
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450 Golden Gate Avenue
San Francisco, California 94102

Mr. William N. Willens, Esq.
Barrett, Stearns, Collins, Gleason & Kinney
1150 Union Bank Tower
Del Amo Financial Center
Torrance, California 90503

I, Sandra Hosking, declare under penalty of perjury that the foregoing is true and correct.

Executed on November 18, 1976, at Sacramento, California.

Sandra Hosking

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United States Court of Appeals
For the Ninth Circuit
Civil Action No. 77-1017

City of Rohnert Park, a municipal corporation,
Plaintiff-Appellant,

v.

James T. Lynn, as Secretary of the United States Department of Housing and Urban Development, City of Santa Rosa, a municipal corporation, Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic, and Ernest W. Hahn, Inc., a California corporation,
Defendants-Appellees.

OPENING BRIEF OF PLAINTIFF-APPELLANT IN APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA

Honorable William W. Schwarzer

* * * * * * *

STATEMENT OF FACTS RELEVANT TO THE ISSUES

Within the boundaries of Appellant, there is an area designated for commercial development. This area consists of about forty-five (45) assessor's parcels owned and assessed to seventeen (17) persons.[3] Appel-

[3] R.L. Brust Affidavit, Exhibit A (R. 1018).

lant owns two of said parcels, and its property is either available for commercial uses "or is zoned for commercial uses.[4] Over a period of approximately twenty (20) years, in excess of a million ($1,000,000) was spent under Appellant's direction for street construction, sewers, water mains, drainage and other improvements necessary to make the entire site suitable for commercial development. Most of the funds required to defray the cost of these improvements was raised by special assessments levied on the several owners of the property, and this was done pursuant to the Improvement Bond Acts of 1911 and 1915.[5] Altogether these assessments aggregated the sum of approximately $1,030,000.[6]

The bonds issued to raise the money used for the improvements are by virtue of the provisions of the Improvement Bond Acts of 1911 and 1915 payable exclusively from a *fund* created by the payment of the special assessments levied on the owners and their respective properties, and Appellant as well as any other issuer similarly situated is not liable for their payment (25 Cal.Jur.2d, Highways and Streets, Sec. 330, pp. 237-238). This is consistent with the generally accepted notion that when a city engages in the construction of improvements for the benefit of private property it is acting primarily in its *proprietary* capacity, and that money raised and disbursed for the purpose is not "public money," but constitutes "trust funds" held and spent by the city for the benefit of the individual

[4] Callinan Deposition, Vol. I, pp. 39-40.
[5] Callinan Deposition, Vol. I, pp. 40-43, Vol. II, p. 39.
[6] See Fn. 3, supra (R. 1020-1022).

owner (*City of Seattle* v. *Stirrat* (1909) 55 Wash. 560, 104 Pac. 834, 836-837). We submit, therefore, that Appellant in its capacity as *agent*, *representative* and *trustee* of its property owners, and as custodian and guardian of the collective rights of its inhabitants, has *standing* to bring this equitable suit to enjoin Appellees' unlawful conduct thereby rendering unnecessary a *multiplicity* of such suits (*Muncie National Gas Co.* v. *City of Muncie* (1903), 160 Ind. 97, 66 N.E. 436, 441; *City of Saint Mary's* v. *Hope Natural Gas Co.* (1913), 71 W.Va. 76, 76 S.E. 841; *City of Lansoure* v. *Lasell* (1914), 26 N.D.638, 145 N.W. 577, 578; *City of Saginaw* v. *Consumers Power Co.* (Mich. 1921), 182 N.W. 146, 154; 64 C.J.S., Municipal Corporations, Sec. 2190, p. 1032; 56 AmJur.2d, Municipal Corporations, Etc., Sec. 16, pp. 81-82; McQuillen, Municipal Corporations, Sec. 49.57, pp. 302-303).

Moreover, the interests of Appellant and its inhabitants coincide harmoniously with those of its property owners. Consideration of the nature and administration of the California retail sales tax (*City of San Joaquin* v. *State Board of Equalization* (1970) 9 C.A.3d 365, 370-371), makes it evident that a heavy concentration of retail merchandising business in Appellee City will enhance the retail sales tax revenues of that city, while diminishing those to which Appellant might otherwise be entitled, and as a consequence Appellant is threatened by the conduct of Appellees with a loss of revenues which it could use either directly or indirectly for the benefit or relief of its inhabitants. Also, Appellant is the proprietor of property within its commercial area which is likewise threatened with financial loss should Appellees' scheme succeed. Accordingly, in this case, as in other cases involving cities, and the antitrust statutes (*Chattanooga Foundry & Pipe Works* v. *City of Atlanta* (1906), 203 U.S. 390, 395-396, 51 L.Ed. 240, 243-244), it can be said that Appellant has standing to *sue* to vindicate such of its *"own proprietary interests"* as are *"congruent with the interests of"* its "inhabitants" [*State of California* v. *Automobile Manufacturers Association, Inc.*, supra, 481 F.2d 122, 130-131 (1973)].

Appellant, it may be argued, is here seeking relief which is *unrelated to competition*, but even if this be so, it has *standing to sue* under Section 16 of the Clayton Act, because the relief it seeks *"serves the antitrust function of ending an ongoing violation"* of the Sherman Act (*State of Washington* v. *Automobile Manufacturers Association*, supra, 538 F.2d 213, 237).

* * * * * * *

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United States Court of Appeals
for the Ninth Circuit

Civil Action No. 77-1017

City of Rohnert Park, a municipal corporation,
Plaintiff-Appellant

v.

James T. Lynn, as Secretary of the United States Department of Housing and Urban Development, City of Santa Rosa, a municipal corporation, Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic, and Ernest W. Hahn, Inc., a California corporation,
Defendants-Appellees

RESPONSE TO REQUEST BY APPELLANT FOR JUDICIAL NOTICE AND REQUEST BY APPELLEE FOR JUDICIAL NOTICE

Appellees City of Santa Rosa and the Urban Renewal Agency of the City of Santa Rosa (the "Santa Rosa defendants") hereby respond to the request by Appellant for Judicial Notice and respectfully request this Court to take judicial notice of the matters set forth below pursuant to the provisions of Section 201(d), Federal Rules of Evidence:

RESPONSE TO REQUEST OF APPELLANTS FOR JUDICIAL NOTICE

The Santa Rosa defendants join in the request of Appellant that the Court judicially notice the opinion of the United States Supreme Court in *City of Lafayette, Louisiana* v. *Louisiana Power and Light Co.* (1978) ___ U.S. ___, 55 L.Ed.2d 364, which was decided after the briefs in this case were filed. The Santa Rosa defendants have been required by the Community Redevelopment Law (Health and Safety Code §33000 *et seq.*), as a prerequisite to initiating the Santa Rosa Center Urban Renewal Project, to demonstrate that the project area is blighted. Moreover, the land disposition agreement between the Santa Rosa defendants and Ernest W. Hahn, Inc., is redevelopment action of the type contemplated by the mandate of the state legislature contained in this law that local government take all actions necessary to carry out lawfully adopted redevelopment plans. Given these circumstances, the plurality opinion of the Supreme Court in *City of Lafayette*, *supra*, supports the argument of appellees that the actions of the Santa Rosa defendants in entering into and carrying out the land disposition agreement are exempt from application of federal antitrust laws because they are governmental actions pursuant to a state policy, articulated in the Community Redevelopment Law, to displace the unregulated competition of the real estate market within the boundaries of the project and, by government intervention, to provide the means of alleviating and removing the social, economic and physical liabilities of urban blight. The general principles which require

this conclusion have been discussd at pp. 54-62 of the Opening Brief of the Santa Rosa defendants.

By Health and Safety Code §33036, the California legislature has determined that individual landowners lack incentive to improve, modernize and rehabilitate property in blighted areas so long as the condition of neighboring property remains unchanged and, as a result, the deterioration of blight cannot be halted or corrected except by redeveloping entire areas or substantial portions of areas. In the same statute, the state legislature has found that private assembly of land in blighted areas, without governmental intervention, is so difficult and costly that it is uneconomic and as a practical matter impossible for owners to undertake because of a lack of legal power and excessive costs, and that the remedying of blight may require public acquisition and the clearance of such areas and their redevelopment under proper governmental supervision, with appropriate planning, and continuing land use and construction controls.

Based on the foregoing findings, the California state legislature has declared in Health and Safety Code §33037:

> "For these reasons, it is declared to be the policy of this State:
>
> * * *
>
> "(b) That whenever the redevelopment of blighted areas cannot be accomplished by private enterprise alone, without public participation and assistance in the acquisition of land, in planning and in the financing of land assembly, and the work of clearance, and in the making of improvements necessary therefore, it is in the public interest to employ the power of eminent domain, to advance or expend public funds for these purposes, and to provide a means by which blighted areas can be redeveloped or rehabilitated.
>
> "(c) That the redevelopment of blighted areas and the provision of appropriate continuing land use and construction policies in them constitute public uses and purposes for which public money may be advanced or expended and private property acquired, and are public functions of state concern in the interest of health, safety, and welfare of the people of the state and of the communities in which the areas exist."

California cities and counties do not have untrammeled discretion to determine when and how they will exercise the powers delegated by the Community Redevelopment Law. As a prerequisite to redevelopment, the city council or board of supervisors must find, on the basis of evidence contained in a detailed record which is the product of an elaborate planning process, that the area designated for redevelopment is an area suffering from the social, economic and physical liabilities of blight. Health and Safety Code §33033. Health and Safety Code §33367 lists the detailed subfindings required to support such a conclusion that must be part of the ordinance adopting the redevelopment plan.

The justification required by the state law for displacement of unregulated development, use, and purchase and sale of property is the determination that the area suffers from blight, a condition that cannot be eliminated without government intervention into the competitive processes. Appellant, the City of Rohnert

Park, is bound by a final state court *in rem* judgment, which the Santa Rosa defendants hereafter request the Court judicially notice, that has conclusively determined that the Santa Rosa Center Urban Renewal Project is a blighted area qualified for redevelopment and, therefore, appropriate for government intervention in the form of public expenditures and stringent land use and planning controls.

When a project area has been selected and found by the procedures of state law to be a blighted area qualifying for redevelopment, local government is mandated by the state law to carry the plan into effect. Health and Safety Code §3370 provides that the city council, "at the time of, or in connection with, the adoption of the plan, shall declare its intention to undertake and complete any proceedings necessary to be carried out by the community under the provisions of the plan." By Health and Safety Code §33372, upon the filing of the ordinance adopting the plan, "the agency is vested with the responsibility for carrying out the plan."

Redevelopment pursuant to the Law, by definition, contemplates that in carrying out the plan the agency will dispose of land for private development and participate in the construction of public improvement. Section 33020 states, "Redevelopment" means "planning, development, replanning, redesign, clearance, reconstruction, rehabilitation, or any combination of these and the provision of such residential, commercial, industrial, public, or other structures or spaces as may be appropriate or necessary in the interest of the general welfare, including recreational and other

facilities incidental or pertinent to them." The Agency is required to sell all property it acquires in a redevelopment project except property conveyed to a public body. Health and Safety Code §33432.

APPELLEE'S REQUEST FOR JUDICIAL NOTICE

Appellees City of Santa Rosa and Urban Renewal Agency of the City of Santa Rosa request that the Court take judicial notice of the following documents pursuant to Section 201(d), Federal Rules of Evidence:

1. The Findings of Fact and Conclusions of Law and Judgment in the consolidated state court cases designated Sonoma County Superior Court Actions No. 79465, 79762, 84237 and 81799, certified copies of which are attached hereto.

2. The opinion of the Court of Appeal of the State of California, First Appellate District, Division One, in the appeal from the foregoing trial court judgment, designated 1 Civil No. 41,188, a certified copy of which is attached hereto.

3. The notification of denial of hearing by the Supreme Court of the State of California, a copy of which is attached hereto.

In their motion for summary judgment and at pp. 27-36 of their Opening Brief, the Santa Rosa defendants have argued that Rohnert Park is barred by a state court validating proceeding from suing in the federal courts for an alleged violation of state law and federal laws and regulations requiring that redevelopment project property be sold for not less than fair value or for alleged violations of antitrust laws in connection with the sale of the shopping center site to

Ernest W. Hahn, Inc. The Santa Rosa defendants presented documents which established that both of these issues had been raised and determined in a state court *in rem* proceeding brought pursuant a California statute that requires all interested parties to litigate all complaints against a redevelopment project in a single lawsuit and further provides that all parties are barred from raising in any other lawsuit claims that could have been adjudicated in such an *in rem* validating proceeding.

At the time of the motion for summary judgment and the filing of briefs in this case, the state court judgment adjudicating both the fair value claim and the antitrust claim in favor of the Santa Rosa defendants was on appeal in the state courts, and by state law the trial court judgment did not constitute a final judgment. The argument of the Santa Rosa defendants in their Opening Brief explained why the federal court should refuse to entertain these claims because of the *in rem* nature of the state court proceeding.

The documents which the Santa Rosa defendants request that the Court judicially notice establish that the judgment in the state court proceeding is now final and binding upon the City of Rohnert Park. The state court proceeding has determined that the Hahn Contract does not constitute a sale for less than fair value for re-use and does not violate 42 U.S.C. §1460(c)(4), the Urban Renewal Handbook's §7214.1, or Health and Safety Code §33433 and does not constitute a contract, combination or conspiracy in restraint of trade or an action in furtherance of a contract, combination or conspiracy in restraint of trade, or a monopoly, unlawful discrimination, an unfair practice, or unfair competition. By operation of the doctrine of *res judicata*, the judgment of the state court now bars Rohnert Park's attempt to relitigate these issues in the federal courts. See *Starr* v. *City and County of San Francisco* (1977) 72 Cal.App.3d 164.

The Santa Rosa defendants further request that this Court take judicial notice pursuant to Section 201(d), Federal Rules of Evidence, of:

1. The Notice of Action Pending recorded by the Appellants with the County Recorder for the County of Sonoma, State of California, based on this action. A certified copy of this Notice of Action Pending is attached hereto.

2. The Declaration of Richard E. Brandt filed in the Sonoma County Superior Court on August 29, 1978, a certified copy of which is attached hereto.

The *lis pendens* based on this lawsuit has been filed pursuant to California Code of Civil Procedure §409, which provides that such a notice may be filed in an action concerning real property or affecting the title or right of possession of real property. As the Declaration of Richard E. Brandt indicates, the general effect of the recording of such a *lis pendens* is to interfere with the financing of the project, which must be secured by the property. Thus, the *lis pendens* has the potential of preventing the project from proceeding without regard to the merits of the claims of Appellant and without the protection from abuse that would be provided by a bond or by review of the merits if Appellant had sought to achieve this directly by a preliminary injunction or a stay order pending appeal.

At the hearing on the appeal in this action, the Santa Rosa defendants will request that the Court determine, in connection with its review of the merits of this case, that this action does not concern real property or affect the title or right of possession of real property within the meaning of the California statute as it has been construed by the California courts. This lawsuit relates to the real property described in the Notice, the shopping center site to be conveyed to Hahn, only insofar as it includes a prayer requesting that a conveyance be barred as part of the relief. The Santa Rosa defendants submit that *Brownlee* v. *Vang* (1962) 206 Cal.App.2d 814, *Allied Eastern Financial* v. *Goheen Enterprises* (1968) 265 Cal.App.2d 131, and *Kendall-Brief Company* v. *Superior Court* (1976) 60 Cal. App.3d 462, indicate that the California statute authorizes the recording of a *lis pendens* only when the lawsuit involves the adjudication of property rights. This action does not involve an adjudication of the property interest of the parties in the property described in the Notice. Rather, it involves questions as to whether the property can be used for a shopping center and as to the adequacy of consideration paid for the land. The Santa Rosa defendants will request that the Court determine that this action is not one for which the California statute permits the recording of a Notice of Action Pending and specify by its decision that the *lis pendens* filed by the Appellant City of Rohnert Park be expunged.

DATED: November 16, 1978.

McDONOUGH, HOLLAND,
SCHWARTZ & ALLEN
A Professional Corporation

By Richard E. Brandt

Attorneys for Defendants-Appellees
City of Santa Rosa and Urban Renewal
Agency of the City of Santa Rosa

In the
Court of Appeal of the State of California
For the First Appellate District
Division One
Civil Action No. 41188
Sonoma Nos. 79465, 79762, 81799, 84237

CODING ETC., et al.,

v.

URBAN RENEWAL AGENCY ETC. et al.

REMITTITUR

I, Clifford C. Porter, Clerk of the Court of Appeal of the State of California, for the First Appellate District, do hereby certify that the attached is a true and correct copy of the original opinion or decision entered in the above-entitled cause on April 26, 1978 and that this opinion or decision has now become final. Each party shall bear its own costs on appeal.

Witness my hand and the seal of the Court affixed at my office this 29th day of June, 1978.

Clifford C. Porter, Clerk
(s) By Deputy

Receipt of the original remittitur in the above case is hereby acknowledged.

Dated: Nov. 14, 1978 County Clerk

In the Court of Appeal
of the State of California
First Appellate District

Division One
Civil Action No. 41188
(Superior Court Nos. 79465, 79762, 81799, 84237)

Codding Enterprises, a California corporation; Richard B. Codding, individually and on behalf of his minor children John and Bruce Codding; and George David Codding,

Plaintiffs and Appellants,

v.

Urban Renewal Agency of the City of Santa Rosa, a public entity; City of Santa Rosa, a municipal corporation; and City Council of the City of Santa Rosa,

Defendants and Respondents.

Four separate actions challenging an urban renewal plan for Santa Rosa were consolidated for trial. After extended trial, and upon a voluminous record, the trial court upheld the validity of the redevelopment plan. Plaintiffs appeal.

In 1961, an urban renewal project (hereinafter "Phase 1") was adopted by the Santa Rosa City Council for the downtown area of that city. In 1970, following considerable damage to the general area by an earthquake, amendments were adopted adding some 30 acres (Phase 2) to the original project. In 1974, some 12 acres were added (Phase 3). Phases 1 and 2 of the project were sustained against attacks by plaintiff (*Codding Enterprises* v. *Urban Renewal Agency of the City of Santa Rosa,* 1 Civil 36299 filed Oct. 23, 1975) and the present attacks are directed principally to Phase 3.

Despite appellants' contrary contention, we conclude that there is substantial evidence in the

administrative-legislative record to support the findings of the city council and the urban renewal agency that Phase 3 is a blighted area. There also is evidence of substance that the Phase 3 area has become an economic or social liability (as required by *Sweetwater Valley Civic Assn.* v. *City of National City,* 18 Cal.3d 270). The evidence shows that some two-thirds to nine-tenths of the buildings in the area meet the two requirements. Appellants attack the ratio on the ground that it is based on number of buildings, rather than on assessed values thereof. But that attack is insufficiently documented to persuade us that the supporting evidence is insubstantial. We recognize an appellate court's duty to review the evidence before the administrative or legislative body anew, and have made such a review, but we cannot find the supporting evidence inadequate to sustain the findings of the council.

We note, also, that a project area need not be restricted to lands and improvements which are individually detrimental or inimical to public health, safety or welfare (Health & Saf. Code, §33321, as it stood before amendment of 1976), whether the area is contiguous or not (§33320.2 before 1976 amendment). The area of Phase 1 is contiguous to that of Phase 2. Phase 3 is similarly contiguous to Phase 2, although separated from Phase 1 by the area of Phase 2. As the trial court found, Phases 1 and 2 were approved without specific reservation of the right to addition of territory thereto. But a fair reading of the ordinances adopting Phases 2 and 3 discloses findings that each added phase was found to be a reasonable element in the

effective development of the whole area. (Health & Saf. Code, §33321.) A redevelopment project, after adoption, may be amended at any time "it becomes necessary or desirable" (Health & Saf. Code, §33450). Such amendment becomes effective after proceedings comparable to those for original adoption of the project (Health & Saf. Code, §33451 et seq.), and amendments adding project areas are not in excess of the council's powers, even though they afford an advantage to the redevelopment project's private developer. (*Card* v. *Community Redevelopment Agency,* 61 Cal.App.3d 570, 573, fn. 1.)

Appellants, however, asert that Phase 1 had been completed at the time Phase 3 was added by amendment. Thus, they claim, the increased tax revenues yielded by assessment increases resulting from the redevelopment project had in fact become payable to the several taxing agencies within whose boundaries the project lies (Health & Saf. Code, §33670, subd. (b)). But that section provides for such return to the taxing agencies only after "loans, moneys advanced to, or indebtedness (whether funded, refunded, assumed, or otherwise) incurred by such redevelopment agency" to finance the redevelopment project, with interest thereon, have been paid (*id.*). The finding upon which appellants rely is only that Phase 1 had been "substantially completed," and this obviously refers to physical construction. There is, and could be, no finding that Phase 2, which had been added as a necessary part of Phase 1, had been completed. Moreover, there is no suggestion that all indebtedness of Phase 1, much less Phase 2, had been paid. Thus the necessary prerequi-

site to return of the entire tax proceeds to the several taxing agencies had not occurred. We recognize that to make amendments merely to broaden the tax base for redevelopment may well be improper (see *Regus* v. *City of Baldwin Park,* 70 Cal.App.3d 968, 975-976). Here, however, substantial evidence shows that Phase 2 and Phase 3 were each deemed to be an area "necessary for effective redevelopment of the area of which it is a part." On the whole record, we cannot conclude that the findings linking the three phases as a single redevelopment area were but subterfuge. Nor can we, as do appellants, regard Phase 3 as but a subterfuge to avoid return of the full value of Phase 1 to the general taxing agencies.

Appellants next assert that the price to be paid by the developer to the agency is less than its fair market value. It is undisputed that the appraisal accepted and approved by the urban renewal agency, the city council, and the Department of Housing and Urban Development does show the purchase price to be the fair market value. Appellants, however, assert that this appraisal is deficient as a matter of law. They argue that the appraisal wholly fails to give consideration to the costs to be paid by the agency in the redevelopment project. But the Lane appraisal reviews the project in detail, and states all such items. That it does so in a statistical form not chosen by appellants, or that its end result differs from theirs, does not invalidate the figure which Lane deems fair market value of the land to be sold.

Appellants particularly object to the appraiser's crediting the developer with a portion of the cost of

extensive parking structures which, under the redevelopment plan, are to be built by him at his own expense, and turned over to the city for free public use. Under one option afforded to it the agency is to pay far less than the total cost of such parking structures, and the developer is to make payments to the city, in annual and increasing amounts, in lieu of taxes thereon. Thus the city will acquire a needed parking facility for general public use, and will be paid by the developer an amount adequate to cover all expense of operating and maintenance plus a substantial amount in lieu of taxes which the several taxing agencies could not recover if the city were the original and continuing owner. Under the other option of the agency, the developer pays all cost of the public structures, and is to maintain them for free use by the public unrestricted to users of the shopping center.

We find no error in the planned credit to the development for what, in effect, amounts to a trade of the completed structure for credit upon the purchase price of the total property. The right to make a trade of property of at least equal value is recognized by one of the authorities upon which appellants rely (*Harman* v. *City & County of San Francisco,* 7 Cal.3d 150, 165, fn. 6).

Appellants also seek to view all expenditures of the agency, for traffic lights, streets, street lights and all other facilities, as benefitting solely the redevelopment area. It is apparent that many of these items are of benefit to the public of the city generally. But even if this deficiency in appellants' argument be ignored, the price to be paid by the developer substantially exceeds

the agency contribution, particularly when the benefit of the developer's contribution of parking structures is recognized.

A redevelopment plan is required to conform to the community's general plan (Health & Saf. Code, §33331) and the city council is required to so certify (*id.*, §33367). The city council, on recommendation of the city planning commission, has so certified. There is no question that the redevelopment is consistent, in all major respects, with the general plan adopted in 1967 and amended by the addition in 1969 of a plan for the central business district. Appellants, however, point to two streets proposed by the redevelopment plan to be closed. Continued existence of these streets is contemplated by the general plan as it relates to the central business district. But, by joint resolution of the planning commissions of Santa Rosa and Sonoma County, adopted late in 1967, it is stated that the "General Plan is not a precise plan nor a zoning ordinance and does not show or pretend to show the exact location of streets . . ., but shows their general location, character and extent." The redevelopment plan proposes a substitute grid of streets and a traffic loop for this portion of the business district. The question of conformity to the general plan was submitted to the planning commission, which found it generally consistent. The city council made a like finding. We find no reason to interfere. We note that no ordinance closing either street has been adopted, or even introduced, by the city council. Thus we do not have the issues of evidence and findings which may arise (see *City of Rancho Palos Verdes* v. *City Council,* 59 Cal.App.3d

869).

An environmental impact report was prepared and advertised. Comments thereon were made, and those adverse were met by reasonable data, discussion, and amendment. The agency and the city then approved the E.I.R., finding only that the project "will not have an adverse effect upon the environment." This finding is merely in the language of the statute and appellants assert it to be therefore conclusory and, without subfindings, insufficient. We are compelled to agree. "The challenged decision must set forth findings to bridge the analytical gap between the raw evidence and ultimate decision . . . ." (*Topanga Assn. for a Scenic Community* v. *County of Los Angeles,* 11 Cal.3d 506, 515.) A resolution approving an E.I.R. should at least identify some of the adverse effects inherent in almost any development, and determine that they are outweighed by the project's advantages (*San Francisco Ecology Center* v. *City and County of San Francisco,* 48 Cal.App.3d 584, 596 [hg. den.]; see also *City of Rancho Palos Verdes* v. *City Council, supra,* 59 Cal.App.3d 869, 890). Reading of the draft E.I.R., the comments thereon, the answers thereto and the amendments evoked thereby in the final E.I.R. would seem to reveal the reasoning processes of the appraising agencies, but somewhat more detailed findings than were here made are required. The record discloses ample evidence to support adequate findings approving the E.I.R., and we find no merit in appellants' claims that alternatives are not adequately considered, or that the responses to comments on the draft E.I.R. are inadequate. Nonetheless, the authorities require us to

remand the matter for more detailed findings by agency and council.

We find no merit in the contention that the actions of the agency and the council are void because of claimed conflicts of interest of members thereof.

The judgment is reversed only insofar as it sustains the findings of the agency and the council approving the E.I.R. That issue is to be remanded by the trial court to those two bodies for reconsideration of their findings approving the E.I.R. Each party shall bear its own costs on appeal.

By: J. Draper*

We concur:
P.J. Racanelli
J. Elkington

*Retired Presiding Justice of the Court of Appeal assigned by the Chairperson of the Judicial Council.

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Attorneys for Defendants-Appellees
City of Santa Rosa and Urban Renewal
Agency of the City of Santa Rosa

United States District Court
Northern District of California
Civil Action No. 74-2429 WWS

City of Rohnert Park, a municipal corporation,
Plaintiff-Appellant,

v.

James T. Lynn, as Secretary of the United States Department of Housing and Urban Development, City of Santa Rosa, a municipal corporation, Urban Renewal Agency of the City of Santa Rosa, a public politic, and Ernest W. Hahn, Inc., a California corporation,

Defendants-Appellees.

NOTICE OF MOTION TO EXPUNGE *LIS PENDENS*
[28 U.S.C. §1964, California Code of Civil Procedure §409.1]

TO PLAINTIFF CITY OF ROHNERT PARK AND WILLIAM N. WILLENS, ITS ATTORNEY:

PLEASE TAKE NOTICE that on December 14, 1979, at 11:00 a.m. in the Courtroom of the Honorable William W. Schwarzer, located in the Federal Building at 450 Golden Gate Avenue, San Francisco, California, defendants City of Santa Rosa and Urban Renewal Agency of the City of Santa Rosa (now known as the Redevelopment Agency of the City of Santa Rosa) will

move the Court for an order expunging the Notice of Action Pending (*lis pendens*) recorded by plaintiff City of Rohnert Park in the Official Records of the County of Sonoma, California.

The motion will be made on the ground that this action does not affect the title to or right of possession of the real property described in the notice and on the ground that this action has not been commenced or prosecuted in good faith and for a proper purpose.

This motion will be based on the brief of defendants City of Santa Rosa and Redevelopment Agency of the City of Santa Rosa, this notice of motion, the Affidavit of Richard E. Brandt and exhibits filed in support of the motion, the Proposed Order submitted with the motion and on such matters as may be presented at the time of the hearing on the motion.

Dated: November 21, 1979.

McDONOUGH, HOLLAND,
SCHWARTZ & ALLEN
A Professional Corporation

By Richard E. Brandt

Attorneys for Defendants-Appellees
City of Santa Rosa and Urban Renewal
Agency of the City of Santa Rosa

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the County of Sacramento; I am over the age of eight-

een years and not a party to the within above entitled action; my business address is 555 Capitol Mall, Suite 950, Sacramento, California 95814. On November 21, 1979, I served the within NOTICE OF MOTION TO EXPUNGE LIS PENDENS on the parties in said action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box at Sacramento addressed as follows:

John J. Powers III, Esq.
Appellate Section
Antitrust Division
Department of Justice
Washington, D.C. 20530

Richard J. Hecht, Esq.
William N. Brinton, Esq.
Cotton, Seligman & Ray
One Maritime Plaza
San Francisco, CA 94102

G. Williams Hunter, Esq.
Paul E. Locke, Esq.
450 Golden Gate Avenue
Post Office Box 36055
San Francisco, CA 94102

William N. Willens, Esq.
Barrett, Stearns, Collins, Gleason & Kinney
1150 Union Bank Tower
Del Amo Financial Center
Torrance, CA 90503

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 21, 1979, at Sacramento, California.

Mary M. Miller

BRUCE LEAVITT, City Attorney
City of Santa Rosa
100 Santa Rosa Avenue
Santa Rosa, California 95403
Telephone: (707) 528-5261

McDONOUGH, HOLLAND, SCHWARTZ & ALLEN
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Attorneys for Defendants

In the Superior Court of the State of California
In and For the County of Sonoma
Civil Action Nos. 79465, 79762, 84237, 81799

Codding Enterprises, et al.,
Plaintiffs,
v.
Urban Renewal Agency of the City of Santa Rosa, et al.,
Defendants.

NOTICE OF ORDER *EXPUNGING LIS PENDENS* TO PLAINTIFFS AND TO THEIR ATTORNEY OF RECORD HEREIN:

NOTICE IS HEREBY GIVEN that on October 25, 1978, the Court, having granted defendants' Motion to Expunge Lis Pendens Notice from Record, filed its Order Expunging Lis Pendens. A copy of the Order Expunging Lis Pendens is attached to this notice.

Dated: August 22, 1979.

BRUCE LEAVITT, City Attorney
City of Santa Rosa

McDONOUGH, HOLLAND, SCHWARTZ & ALLEN
A Professional Corporation

By Richard E. Brandt

Attorneys for Defendants

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In the Superior Court of the State of California
In and For the County of Sonoma
Civil Action Nos. 79465, 79762, 84237, 81799

Codding Enterprises, a California corporation, in its own behalf and on behalf of all other persons similarly situated,
Plaintiffs,
v.
Urban Renewal Agency of the City of Santa Rosa, a public entity, and does one through twenty,
Defendants.

ORDER EXPUNGING LIS PENDENS
[CCP §§ 409.1, 1003]

The motion of defendants Redevelopment Agency of

the City of Santa Rosa and City of Santa Rosa for an order expunging a notice of lis pendens came on regularly for hearing on August 14, 1978. Plaintiffs appeared by William J. Smith, Esq., their attorney; and defendants appeared by Richard E. Brandt, Esq., of McDonough, Holland, Schwartz & Allen, A Professional Corporation, their attorneys.

The court, having considered the declarations, memoranda of points and authorities, supplemental memoranda of points and authorities, and other documents and evidence in support of and in opposition to the motion, having considered the opinion of the Court of Appeal for the First Appellate District in this case and the Findings of Fact, Conclusions of Law and Judgment previously entered in this action by the Honorable J. Hilary Cook, having heard the arguments of counsel, and being fully advised in the premises, finds that the Notice of Lis Pendens should be expunged on the ground that the action before this Court on remand does not affect title to or right of possession of the real property described in the Notice.

IT IS ORDERED that the motion of defendants be, and the same is hereby, granted, and that the Notice of Lis Pendens recorded in the Office of the County Recorder of Sonoma County, City of Santa Rosa, California, by plaintiffs on February 27, 1978, at Book 3359, Page 325, of the Official Records of the County of Sonoma, referring to the property located in the City of Santa Rosa, County of Sonoma, State of California, described as follows:

> Commencing at the southwest corner of the intersection of Third and "B" Streets, then southeasterly along the West line of "B" Street to the north line of First Street; thence southwesterly along the North line of First Street to a point approximately 90 feet west of the west line of "A" Street; thence southeasterly to the northern line of the land owned by the Sonoma County Water Agency; thence southwesterly along this line to the west boundary of the Santa Rosa Center Project, Calif. R-45, thence northeasterly along this boundary to Third Street; thence easterly along the south line of Third Street to the point of beginning.

be hereby expunged so as not to constitute constructive or actual notice of any of the matters contained therein, or any of the matters relating to such action, nor create any duty of inquiry in any person hereafter dealing with the property described therein.

DATED: October 23, 1978.

Judge of the Superior Court

PROOF OF SERVICE BY PERSONAL DELIVERY

I am a citizen of the United States and a resident of the County of Sacramento; I am over the age of eighteen years and not a party to the within above-entitled action; my business address is 555 Capitol Mall, Suite 950, Sacramento, California 95814. On August 23, 1979, I served the within NOTICE OF ORDER EXPUNGING LIS PENDENS on the plaintiffs' counsel in said action by personally delivering a true copy thereof to William J. Smith, Esq. at the Sonoma County Courthouse, 2555 Mendocino Avenue, Santa Rosa, California.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 23, 1979, at Santa Rosa, California.

Richard E. Brandt

The California Health and Safety Code, Section 33500:

> § 33500. No action attacking or otherwise questioning the validity of any redevelopment plan, or amendment to a redevelopment plan, or the adoption or approval of such plan, or amendment, or any of the findings or determinations of the agency or the legislative body in connection with such plan shall be brought prior to the adoption of the redevelopment plan nor at any time after the elapse of 60 days from and after the date of adoption of the ordinance adopting or amending the plan.
>
> The amendments made to this section at the 1977-78 Regular Session of the Legislature do not represent a change in, but are declaratory of, existing law.

The California Health and Safety Code, Section 33501:

§ 33501. An action may be brought pursuant to Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure to determine the validity of bonds and the redevelopment plan to be financed or refinanced, in whole or in part, by the bonds, or to determine the validity of a redevelopment plan not financed by bonds, including without limiting the generality of the foregoing, the legality and validity of all proceedings theretofore taken for or in any way connected with the establishment of the agency, its authority to transact business and exercise its powers, the designation of the survey area, the selection of the project area, the formulation of the preliminary plan, and the adoption of the redevelopment or renewal plan, and also including the legality and validity of all proceedings theretofore taken and (as provided in the bond resolution) proposed to be taken for the authorization, issuance, sale and delivery of the bonds and for the payment of the principal thereof and interest thereon.

The California Health and Safety Code, Section 33503:

§ 33503. The judgment, if no appeal is taken, or if taken and the judgment is affirmed shall be forever binding and conclusive, as to all matters therein adjudicated or which at that time could have been adjudicated, against the agency and against all other parties and if the judgment determines that the agency is lawfully established, that the redevelopment plan is valid and effective, that the agency is authorized to issue such bonds and that such bonds when issued will be valid, the judgment shall permanently enjoin the institution by any person of any action or proceeding raising any issue as to which the judgment is binding and conclusive.

The California Code of Civil Procedure, Section 860:

§ 860. A public agency may upon the existence of any matter which under any other law is authorized to be determined pursuant to this chapter, and for 60 days thereafter, bring an action in the superior court of the county in which the principal office of the public agency is located to determine the validity of such matter. The action shall be in the nature of a proceeding in rem.

The California Code of Civil Procedure, Section 869:

§ 869. No contest except by the public agency or its officer or agent of any thing or matter under this chapter shall be made other than within the time and the manner herein specified. The availability to any public agency, including any local agency, or to its officers of agents, of the remedy provided by this chapter, shall not be construed to preclude the use by such public agency or its officers or agents, of mandamus or any other remedy to determine the validity of any thing or matter.

The California Code of Civil Procedure, Section 870:

§ 870. The judgment, if no appeal is taken, or if taken and the judgment is affirmed, shall, notwithstanding any other provision of law including, without limitation, Sections 473 and 473.5, thereupon become and thereafter be forever binding and conclusive, as to all matters therein adjudicated or which at that time could have been adjudicated, against the agency and against all other persons, and the judgment shall permanently enjoin the institution by any person of any action or proceeding raising any issue as to which the judgment is binding and conclusive.